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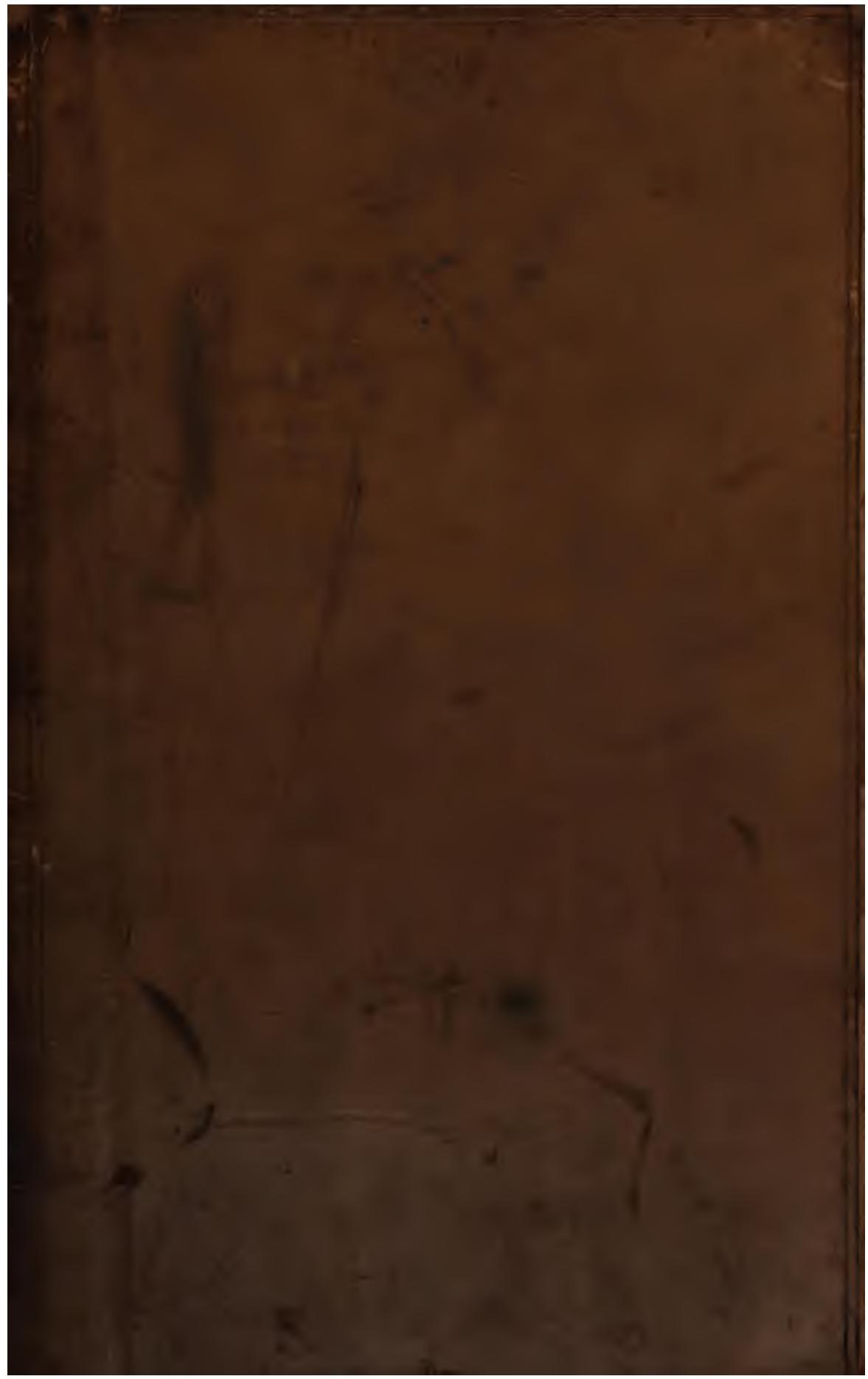
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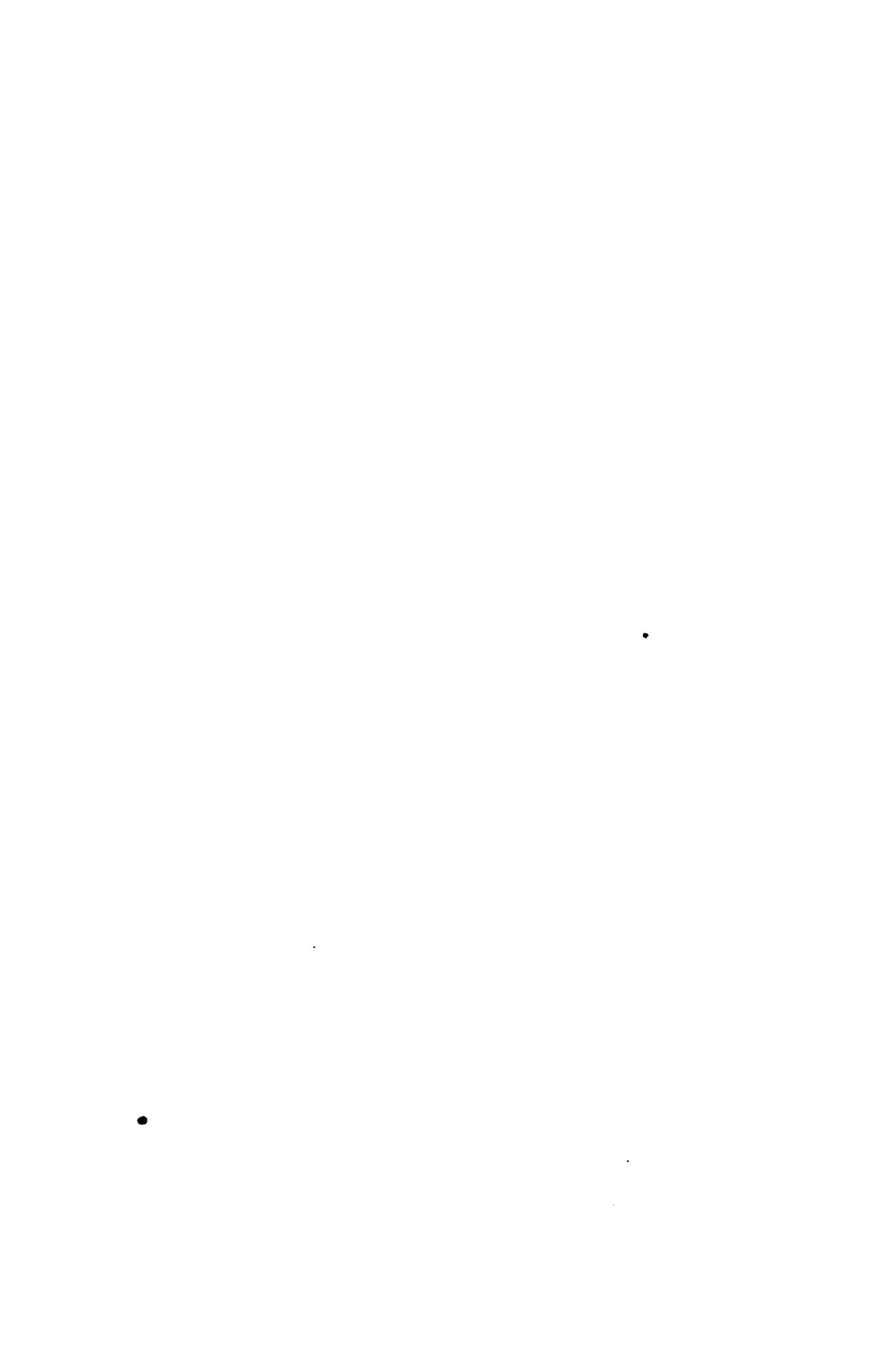
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REPORTS
OF
CASES IN CHANCERY,
ARGUED AND DETERMINED
IN
THE ROLLS COURT
DURING THE TIME OF
LORD LANGDALE,
MASTER OF THE ROLLS.
BY
CHARLES BEAVAN, ESQ., M.A.
BARRISTER AT LAW.

VOL. VI.
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Lord LYNDHURST, *Lord Chancellor.*

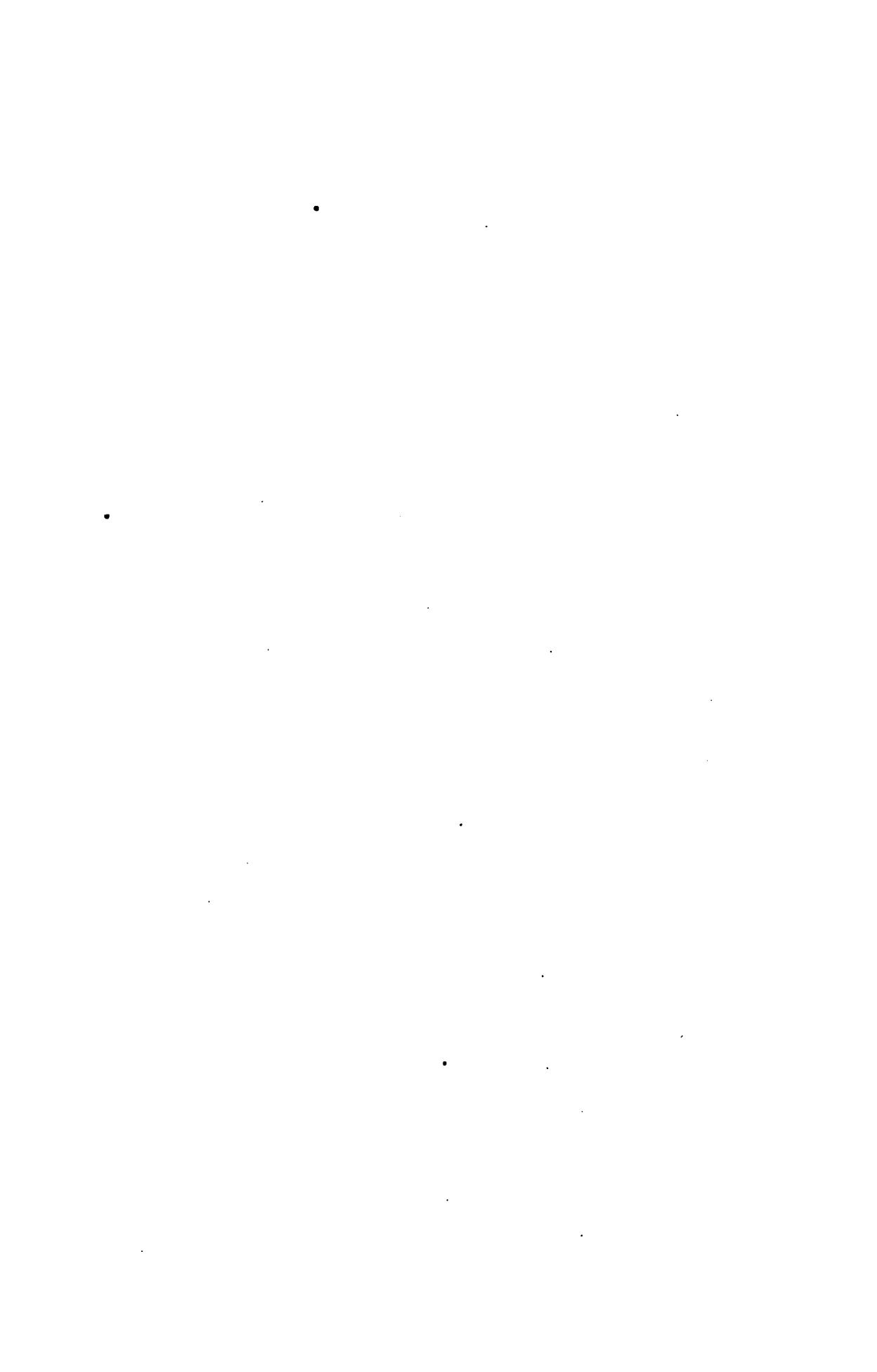
Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor of England.*

Sir JAMES L. KNIGHT BRUCE, }
Sir JAMES WIGRAM, } *Vice-Chancellors.*

Sir FREDERICK J. POLLOCK, }
Sir WILLIAM W. FOLLETT, } *Attorneys-General.*

Sir WILLIAM W. FOLLETT, }
Sir FREDERICK THESIGER, } *Solicitors-General.*



A

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MEMORANDA.

In *Trinity* Vacation 1844, *John Hodgson, Charles Howard Whitehurst, William John Alexander, John Hildyard, and James Parker, Esquires*, were appointed Queen's Counsel.

In *Trinity* Vacation 1844, *Edward Bellasis, James Alexander Kinglake, and Charles Chadwick Jones, Esquires*, were called to the degree of Serjeant-at-Law.

In *Michaelmas* Term 1844, *William Erle, Esquire*, one of Her Majesty's Counsel, was appointed a Judge of the Common Pleas, in the place of The Right Honourable *Thomas Erskine*, resigned.

In *Hilary* Term 1845, *Thomas Joshua Platt, Esquire*, one of Her Majesty's Counsel, was appointed a Baron of the Exchequer, in the place of *Sir John Gurney, Knt.*, who had resigned.



1844.

ORDER OF COURT.

June 21st, 1844.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and consent of HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fifth and sixth years of Her present Majesty, intituled “An act for abolishing certain Offices of the High Court of Chancery in England,” and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following (that is to say):

I.

THAT, for all office copies bespoke after the 22d day of *June* instant, the Clerks of Records and Writs and their Clerks, shall, in lieu and instead of the fee of 8d. per folio, receivable by them under the Order of Court, dated the 22d day of *March* last, receive and take the fee of 6d. per folio, and no more.

Office copies
in Records
and Writs
Clerks' Office,
reduced to 6d.
a folio.

II. THAT

1844.

Similar reduc-
tion in Ex-
aminer's
Office.

II.

THAT, for all office copies bespoke after the 22d day of *June* instant, the Examiners of the High Court of Chancery and their Clerks, shall, in lieu of the fee of 8*d.* per folio, receivable by them under the Order of Court, dated the 15th day of *April* last, receive and take the fee of 6*d.* per folio, and no more.

THAT this Order be entered with the Registrar of the High Court of Chancery.

(Signed) LYNDHURST, C.
 LANGDALE, M. R.
 LANCELOT SHADWELL, V. C. E.
 J. L. KNIGHT BRUCE, V. C.
 JAMES WIGRAM, V. C.

ORDER OF COURT.

November 19th, 1844.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and consent of the Right Honourable HENRY, Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fifth and sixth years of the reign of Her present Majesty, intituled ' An act for abolishing certain Offices in the High Court of Chancery in England,' and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following; (that is to say),

I.

THAT for all office copies bespoke after the 14th day of November instant, the Clerks of Records and Writs shall, in lieu and instead of the fee of 6d. per folio, receivable by them under the Order of Court, dated the 21st day of June last, receive and take the fee of 4d. per folio, and no more.

Office copies
in Records
and Writs
Clerks' Office,
reduced to 4d.
per folio.

II.

THAT for all office copies bespoke after the 14th day of November instant, the Examiners of the High Court of Examiners' Office.

Similar re-
duction in
Examiner's
of Office.

ORDERS IN CHANCERY.

1844.

of Chancery and their Clerks, shall, in lieu and instead of the fee of 6*d.* per folio, receivable by them under the Order of Court dated the 21st day of *June* last, receive and take the fee of 4*d.* per folio, and no more.

THAT this Order be entered with the Registrar of the High Court of Chancery.

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

ORDER OF COURT.

December 6th, 1844.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and consent of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby order and direct in manner following (that is to say):

THAT, in every case in which application shall be intended to be made for the discharge of any prisoner in contempt, and for the payment out of the Suitors' Fund of the costs of such contempt, in pursuance of the provisions, for that purpose, contained in an Act of the first year of the reign of His late Majesty King *William* the Fourth, intituled, "An Act for altering and amending the Law regarding Commitments by Courts of Equity for contempts, and the taking of Bills *pro confesso*," notice, in writing, of such intended application shall be served upon the solicitor to the Suitors' Fund, two clear days at the least before the day upon which the application is intended to be made.

The solicitor of the Suitors' Fund to be served with notice of application under 1 *W. 4.* c. 60. to discharge persons in contempt, and for payment of the costs out of the Suitors' Fund;

THAT, in every case in which a reference to the Master, under the said Act, shall be directed to enquire into and also of proceedings before the

ORDERS IN CHANCERY.

1844.

Master, upon
reference, as
to the poverty
of a prisoner
in contempt.

into the fact of the poverty of any prisoner in contempt, notice, in writing, of the order of reference, and of every warrant to proceed thereupon before the Master, shall be duly served upon the solicitor to the Suitors' Fund.

(Signed) LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

ORDER OF COURT.

December 7th, 1844.

Mode of in-
rolling cer-
tificate of the
Secretary of
State under
the 7 & 8
Vict. c. 66.,
granting to an
alien friend
settled here,
the rights of a
natural born
British subject.

I do hereby direct, that any person desiring to enrol a certificate issued by one of Her Majesty's principal Secretaries of State, pursuant to the statute of 7 & 8 *Vict. c. 66.*, shall produce to the Secretary of the Master of the Rolls, the same certificate, together with a certificate of a Judge, or of a Master, or Master Extraordinary in Chancery, to be indorsed thereon, or written at the foot thereof, that the oath directed by the Statute to be taken has been taken and subscribed by the memorialist to whom the certificate has been granted by the Secretary of State. And that thereupon, and after obtaining a fiat for that purpose from the Master of the Rolls, the Clerk of the Inrolments shall inrol the said certificate issued by the said Secretary of State, and also the said certificate of the said Judge, or Master, or Master Extraordinary in Chancery. And that the same, when inrolled, may be inspected, and copies thereof may be made, in the same manner as in the case of other documents inrolled for safe custody in Chancery.

LYNDHURST, C.

REPORTS,
OF
CASES
ARGUED AND DETERMINED
IN
THE ROLLS COURT.

CHARLES DUKE of BRUNSWICK *v.* The
KING of HANOVER.

1843.
Nov. 15. 20,
21, 22, 23.

1844.
Jan. 15.

Discussion of
the question
whether a
sovereign
prince is
liable to the

The

THIS case came on upon general demurrer to the
bill filed by *Charles Duke of Brunswick* against the
King of *Hanover*.

jurisdiction of the courts of a foreign country, in which he happens to be resident, and as to the liability to suit of one who unites in himself the characters both of an independent foreign sovereign and a subject.

A sovereign prince, resident in the dominions of another, is ordinarily exempt from the jurisdiction of the courts there.

A foreign sovereign may sue in this country, both at law and in equity; and, if he sues in equity, he submits himself to the jurisdiction, and a cross bill may be filed against him, which he must answer on oath; but a foreign sovereign does not, by filing a bill in Chancery against *A.*, make himself liable to be sued in that court for an independent matter by *B*.

The King of *Hanover*, after his accession, renewed his oath of allegiance, to the Queen of England, and claimed the rights of an *English* peer. Held, that he was exempt from the jurisdiction of the *English* courts for acts done by him as a sovereign prince, but was liable to be sued in those courts in respect of matters done by him as a subject. Held also, that the sovereign character prevailed where the acts were done abroad, and also where it was doubtful in which of the two characters they had been done.

A foreign sovereign prince, who was also an *English* peer, was made a Defendant to a suit and served with a letter missive. The Lord Chancellor refused to recall it. The Defendant then appeared, and filed a demurrer for want of jurisdiction. Held, first, that the Lord Chancellor had not decided that the Defendant was liable to

VOL. VI.

B

the

1844.

The Duke of
BRUNSWICK
v.
The King of
HANOVER.

the jurisdiction of the Court; and, secondly, that the Defendant had not, by appearing, waived any defence to the bill.

A bill, filed by Charles, ex-Duke of Brunswick, against the King of Hanover (subject of this

realm), stated, that by a decree of the Germanic Diet, followed by a declaration of his *Agnati*, he had been deposed, and his brother appointed successor, and that by an instrument

signed by the

reigning Duke and by William the Fourth and his brothers, the Duke of Cambridge had been appointed guardian, of the Plaintiff's fortune, and the guardianship "was to be legally established in Brunswick, where it was to have its locality." That on the death of William the Fourth, the King of Hanover was appointed guardian, and possessed himself of the private property of the Plaintiff. The bill alleged that the instrument was void, and prayed a declaration to that effect, and for an account. Held, that the alleged acts under the instrument, were not such as rendered the Defendant liable to be sued or subject to the jurisdiction of this Court.

Sembler also, that the instrument complained of was, under the circumstances stated in the bill, connected with political and state transactions, and was a state document.

In a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew a case rendering the sovereign prince liable to be sued as a subject.

A simple allegation that a foreign instrument depending on foreign law is null and void, is too vague.

The bill stated that in *September* 1830 the Plaintiff was the Sovereign reigning Duke of Brunswick; that, in his private capacity, the Plaintiff was possessed of real and personal property in *England* and elsewhere to a very considerable amount.

That, on the 6th of *September* 1830 a revolutionary movement took place at *Brunswick*, in the course of which the government was overthrown. That a decree of the *Germanic Diet of Confederation* was made, on the 2d of *December* 1830, whereby the Plaintiff's brother, *William Duke of Brunswick*, was invited to take upon himself, provisionally, the government of the said duchy, and the Diet left it to the legitimate *agnati* of the Plaintiff to provide for the future government of the said duchy.

That in *February* 1831, His late Majesty King *William* the Fourth and the said *William Duke of Brunswick*, claiming to be the legitimate *agnati* of the Plaintiff, caused to be published a declaration whereby they purported to depose the Plaintiff from the throne of the said duchy, and declared that the throne had passed to the said *William Duke of Brunswick*; and that, in consequence, the Plaintiff's brother had ever since exercised

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reigning Duke and by William the Fourth and his brothers, the Duke of Cambridge had been appointed guardian, of the Plaintiff's fortune, and the guardianship "was to be legally established in Brunswick, where it was to have its locality." That on the death of William the Fourth, the King of Hanover was appointed guardian, and possessed himself of the private property of the Plaintiff. The bill alleged that the instrument was void, and prayed a declaration to that effect, and for an account. Held, that the alleged acts under the instrument, were not such as rendered the Defendant liable to be sued or subject to the jurisdiction of this Court.

Sembler also, that the instrument complained of was, under the circumstances stated in the bill, connected with political and state transactions, and was a state document.

In a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew a case rendering the sovereign prince liable to be sued as a subject.

A simple allegation that a foreign instrument depending on foreign law is null and void, is too vague.

the rights, powers, and authorities of Sovereign Duke of *Brunswick*.

That, in the year 1838, the following instrument in writing, signed by King *William* the Fourth and *William* Duke of *Brunswick*, was promulgated by them: “We, *William* the Fourth, by the grace of God King of the United Kingdom of *Great Britain* and of *Ireland* and of *Hanover*, Duke of *Brunswick* and of *Lunebourg*, and we *William*, by the grace of God Duke of *Brunswick* and of *Lunebourg*, make known what follows:— Moved by the interests of our house, whose well being is confided to us, and yielding to a painful but inevitable necessity, have thought it necessary to consider what measures the interests (rightly understood) of His Highness *Charles* Duke of *Brunswick*, the preservation of the fortune now in his hands, the dangers and illegality of the enterprises pursued by the said Duke, and lastly, the honour and dignity of our house may require; and after having heard the advice of a commission charged by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law; and whereas, after the dissolution of the *German* empire, the powers of supreme guardianship over the princes of the empire, which, up to that period, had appertained to the Emperor, devolved to the heads of sovereign states; we, taking into consideration the laws and customs, and by virtue of the rights unto us belonging, in quality of heads of the two branches of our house, have decreed as follows:—

“ Article the first. Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that His Highness Duke *Charles* is, at this time, wasting the fortune which he possesses in enterprises alike impossible and dangerous both to himself and

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other persons, and is seeking to damage the just claims which certain persons interested now or hereafter may legally have upon his property: we have consequently considered that the only method of preserving the fortune of His Highness Duke *Charles* from total ruin, is to appoint a guardian over him.

“ Article the 2d. In consequence of this conviction, we decree that *Charles* Duke of *Brunswick* shall be deprived of the management and administration of his fortune. A guardian shall be appointed, whom we shall choose by mutual consent from amongst the very noble or noble male scions of our house, although the right of choice belongs to the legitimate Sovereign of the Duchy of *Brunswick* in virtue of his title alone.

“ Article the 3d. His Royal Highness the Duke of *Cambridge*, Viceroy of *Hanover*, having declared that he will willingly accept such guardianship, we confide the same to His Royal Highness by the present decree, which he will be pleased to consider as constituting his title to such guardianship.

“ Article the 4th. As His Royal Highness the Duke of *Cambridge* cannot, by reason of his position, by himself alone, exercise the functions of guardian; he is authorised to limit himself to the functions of supreme guardian, and to substitute, for the management and administration of the property, one or more persons, who, under oath, will proceed in their own name and on their own personal responsibility to make an inventory of the same, and to take measures for the preservation and administration of the fortune placed under the guardianship of His Royal Highness the supreme guardian, who is to be at liberty to grant to them fees proportionate to their duties.

“ Article

“ Article the 5th. The administrators shall render an annual account of their management to His Royal Highness the supreme guardian, who shall be asked to transmit the same to us, that we may cause the same to be settled and approved. Our confirmation shall be applied for, in all cases wherein the laws require the consent of the supreme guardian.

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“ Article the 6th. The guardianship is to be considered as legally established in *Brunswick*, where it is to have its locality.

“ Article the 7th. The present decree shall be published in the bulletins of the laws of the kingdom, in accordance with the usual forms, and all whom the same may concern are bound to render obedience thereto. Given at our Palace of *St. James'* the 6th of *February* 1833, and at *Brunswick* the 14th of *March* 1833. We have signed with our proper hands and have placed our seal.

“ *William (L.S.)*.

“ *William Duke (L.S.)*.

“ The Baron *Ompteda de Schleinitz*.”

That at the foot of the said instrument was a note signed by the Defendant (then the Duke of *Cumberland*), and by the Dukes of *Sussex* and *Cambridge*, which was as follows:— “ The undersigned have acknowledged, with gratitude the foregoing arrangement, adopted by His Majesty in accordance with His Highness the reigning Duke of *Brunswick*, in the interests, well advised, of His Highness the Duke *Charles of Brunswick*, for the preservation of the fortune remaining in his hands, for the maintenance of the public peace in the duchy of *Brunswick* and in the kingdom of *Hanover*, and for the honour and dignity of the great house of

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*Brunswick Lunebourg*, another proof of the foresight of His Majesty and of His Highness for the well being of that house. We solemnly attest this declaration by these presents signed with our hand, and to which we have placed our seals. *London, 6th February, 1833, Ernest (L. S.); Kensington, 3d February, 1833, Augustus Frederick (L. S.); Hanover, 18th February, 1833, Adolphe (L. S.)*."

The bill then stated, that the Plaintiff was advised, as the fact was, that the said instrument was absolutely void and of no effect, but that nevertheless the Duke of *Cambridge* accepted the appointment of supreme guardian of the Plaintiff's fortune and property; that he took possession of the real estates to which the Plaintiff was entitled in his private capacity, at *Brunswick*, and took possession of all such parts of the Plaintiff's property in *Brunswick* and elsewhere of a personal nature, as he could discover, and to the amount of several hundred thousand pounds in the whole; that he sold and converted several parts thereof into money, and made certain payments on account of the Plaintiff and of his property; but that after allowing for such payments, there remained in his hands a very large surplus unaccounted for. That King *William* the Fourth died on the 20th of *June* 1837; and thereupon, the present Defendant became King of *Hanover*; and the Duke of *Cambridge* having resigned his appointment of guardian, by some instrument in writing to which the Defendant was a party, and which was signed by him and by *William* Duke of *Brunswick*, the Defendant was purported to be appointed guardian of the Plaintiff, and of his fortune and property, in the place of the Duke of *Cambridge*, under the instrument of the 6th of *February*, and the 14th of *March* 1833, and with all the same powers and authorities as were thereby purported to be conferred on the Duke of *Cambridge*; that the Duke of *Cambridge* accounted for his

his receipts and payments to the Defendant, and paid him the balance; that the Defendant took possession of the Plaintiff's property, and had received large sums of money on account thereof, and had thereout made some payments on account of the Plaintiff, but that a very large balance or surplus, to the amount of several hundred thousand pounds, remained due from the Defendant to the Plaintiff on account thereof, and that the Defendant refused to comply with the Plaintiff's application for an account thereof.

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The bill charged that the instrument of the 6th of *February* and the 14th of *March* 1833, and the appointment of the Duke of *Cambridge* as guardian, and the appointment of the Defendant as guardian, were wholly invalid, according to the laws, as well of *Brunswick* and of *Hanover* as of *Great Britain*, but that, under colour thereof, the Duke of *Cambridge* and the Defendant, respectively, took possession of the Plaintiff's property on his behalf, and not adversely; that by the law of *England*, such appointments of guardians and all the rights thereby purported to be given were void, even if the same were valid by the law of *Brunswick*; and that if the same were valid at the time when the same were issued, having regard to the circumstances and situation of the Plaintiff at the time, (which, however, the Plaintiff denied), there was now nothing, in the circumstances or conduct or state of mind of the Plaintiff, to debar him from the full right and power of enjoyment and disposition of his property.

The bill charged that the Defendant was liable to account to the Plaintiff for the receipts and payments, acts, neglects, and defaults of himself and his agents, under and by virtue of his alleged appointment as such guardian as aforesaid.

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That

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That the Duke of *Cambridge*, after becoming guardian, appointed three persons administrators or managers under him, who had been continued by the Defendant, and who made inventories of the Plaintiff's property, and from time to time accounted to the Defendant for their receipts and paid over the balances.

The bill specified certain property taken possession of by the Duke of *Cambridge* and by the Defendant, and stated, that in 1833 and 1834, the Plaintiff was resident in *France*, and that the Duke of *Cambridge*, as guardian, attached his property there, but that the *French* courts declared that the demand of the Duke of *Cambridge* was inadmissible and without legal foundation, and they removed the attachments, and awarded to the Plaintiff damages, together with the costs of the proceedings, the balance of which the Plaintiff recovered from the Duke of *Cambridge*, by an action in the Common Pleas here, to which he submitted. The bill also charged that the damages and costs, amounting to about 6,000*l.*, had been paid out of the Plaintiff's own personal estate.

The bill stated, that in *November* 1830, the Plaintiff made a peaceable attempt to recover possession of his throne; that while at *Osterode* in *Hanover*, for that purpose, he was attacked by a party of armed men, but made his escape, leaving behind him property amounting to 4,500*l.*, which was delivered to the Duke of *Cambridge*, and which had been paid over to the Defendant.

The bill charged that the accounts thereby prayed were intricate and complex, and could not properly be taken except in a court of equity.

The bill also contained the following charge, "That the Defendant is a peer of this realm, and that his title as

as such is His Royal Highness *Ernest Augustus Duke of Cumberland and Teviotdale in Great Britain, and Earl of Armagh in Ireland*; and that since his arrival in this country, and during his late residence therein, he has exercised, and now exercises, his rights and privileges as such peer as aforesaid."

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The bill prayed a declaration that the instrument of *February and March 1833*, and the appointment of the Duke of *Cambridge* as guardian of the Plaintiff's property, and the appointment of the Defendant were void; and that the Defendant might account to the Plaintiff for the property possessed by him, or by any person by his order &c., since his appointment, including that which had been accounted for to the Defendant by the Duke of *Cambridge*; and that the Defendant might pay to the Plaintiff the balance found due from him on taking such account, the Plaintiff thereby offering, on taking such account, to make to the Defendant all just allowances.

The Defendant being resident in *England*, was served with a letter missive, whereupon an application was made, on his behalf, to the Lord Chancellor to discharge it, but which was unsuccessful. (a)

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(a) The Lord Chancellor (on that occasion) said:—

This application is informal, the petition not being intituled in the cause, and on this ground alone I might dismiss the application. But upon the main point, namely, whether a letter missive ought to have been issued in this case, the Defendant is a Peer of the Realm, has taken the oath of allegiance to the Sovereign, and his seat in the House of Peers, and at pre-

sent is resident here. I am of opinion, therefore, without reference to the more general question, that the letter missive was, in this case, properly issued. My attention was directed to the bill in this case, but I do not think I can look at the nature or subject of the suit, in deciding a question respecting the regularity of the process issued for the purpose of obtaining an appearance.

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The Defendant thereupon demurred to the bill, first for want of equity, and secondly on the ground that this Court "had no jurisdiction to grant relief or discovery, as to all or any of the matters or things in the said bill stated and alleged."

The demurrer now came on for argument.

Sir *Charles Wetherell*, Mr. *Pemberton Leigh*, and Mr. *Elmsley*, in support of the demurrer.

The Defendant, who is a recognised independent sovereign, is not amenable to the jurisdiction of this Court. The law of nations, founded on principles of public policy, grants to an individual of this rank while in a foreign country an immunity from process. *Vattel*, who treats of this subject says (*a*), "We cannot introduce in any more proper place, an important question of the law of nations which is nearly allied to the right of embassies. It is asked, what are the rights of a sovereign who happens to be in a foreign country, and how the master of the country is to treat him? If that prince be come to negotiate or to treat about some public affair, he is doubtless entitled in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveller, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction. On his making himself known, he cannot be treated as subject to the common laws, for it is not to be presumed that he has consented to such a subjection, and if a prince will not suffer him in his dominions on that footing, he should give him notice of his intentions.

(*a*) Book 4. Ch. 7. s. 108.

intentions. But if the foreign prince forms any plot against the safety and welfare of the state,—in a word, if he acts as an enemy, he may very justly be treated as such. In every other case he is entitled to full security, since even a private individual of a foreign nation has a right to expect it."

"A ridiculous notion has possessed the minds even of persons who deem themselves of superior understanding to the common herd of mankind. They think that a sovereign who enters a foreign country without permission, may be arrested there; but on what reason can such an act of violence be grounded? The absurdity of the doctrine carries its own refutation on the face of it."

Though a foreign sovereign may sue as Plaintiff in the courts of this country, the general proposition that he may be sued has never been laid down. The dictum in *Calvin's Case* (a), the case in *Selden* (b), and the case of *Hullett v. The King of Spain* (c), which will be cited by the Plaintiff, do not warrant the proposition. In *Calvin's Case*, it is said that a foreign king shall sue and be sued by the name of a king; but no instance is there cited of a sovereign being sued except that of *Baliol King of Scotland*, who was feudatory to the King of *England*, and as such was liable to the jurisdiction of his acknowledged superior lord. *Calvin's Case* shews that a king carries with him to a foreign country all his privileges. It is said, "And hereof there is a notable precedent in *Fleta*, lib. 2. cap. 3. sec. 9., where treating of the jurisdiction of the King's Court of *Marshalsea*, it is said, *et hæc omnia ex officio suo licite facere poterit (ss. Seneschal' aul' hospitii regis)*

*non*

(a) 7 *Rep.* 15 b. *Dow & Cl.* 169., and 2 *Bli.* (N.S.)

(b) *Table Talk, Law*, 5. 31. 1 *R. & M.* 7. n. 1 *Cl. &*

(c) 4 *Russ.* 225. and 560. 1 *Fin.* 353., and 7 *Bli.* 359.

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*non obstante alicujus libertate, etiam in alieno regno dum tamen reus in hospitio regis poterit inceniri secundum quod contigit Paris. anno 14 Ed. 1. de Engelramo de Nogent capio in hospitio regis Angl' (ipso rege tunc apud Parisiam existente) cum discis argenti furatis recenter super facta, rege Franc' hunc presente, et unde licet curia regis Franc' de pred' latrone per castellam Paris. petita fuerit, habitis hinc et inde tractatibus in consilio regis Franc' tandem consideratum fuit: quod Rex Angl' illa regia prerogativa, et hospitii sui privilegio uideretur, et gauderet, qui, coram Roberto Fitz-John milite tunc hospitii regis Angl' Seneschallo de latrocinio conticuus, per considerationem, ejus car, fuit<sup>(2)</sup> suspensus in patibulo sancti Germani de pratis. Which proverb, that though the king be in a foreign kingdom, yet he is judged in law a king there."*

The case in *Selden* is not an authority for this proceeding. It was referred to by Lord Thurlow in *The Native of the Carnatic v. The East India Company*,<sup>1</sup> as appears by the note to that case, where it is stated, - The Lord Chancellor also observed, that the King of Saxe had been once outlawed by Selden's advice to prevent him from taking advantage of his suit: that *the ordinary was bad enough*; but good, until reversed; therefore it was necessary for him to come in to reverse it, in order to take advantage of his suit. His Lordship said, he could not quote a better book for this than Selden's *Tudic Tali*.<sup>2</sup> The ordinary was therefore bad: besides which, it is clear from the circumstance that the Plaintiff had recovered costs, and the existence of other suits, that the King of Saxe had submitted to the jurisdiction.

*Butler*(2) *Mare, 176, 178.**J. 1 Ex. 186, 188.*

*Hullett v. The King of Spain* was the case of a cross bill (a), in which the King of *Spain* having, by his original bill, submitted to the jurisdiction, had rendered himself “subject to the control of the Court, and liable to the rules of practice” (b); and when the King of *Spain* “sues here as a Plaintiff, the Court has complete control over him, and may hold him to all proper terms.” (c) The decision in *The Colombian Government v. Rothschild* (d) depended on the same principle.

The privilege of the foreign sovereign is, at least, equal to that of his ambassador, the *pro-rege*. (e) What then are the privileges of the ambassador, the representative of the king? Now the Act of *Ann* (g) is merely declaratory of the common law and of the law of nations. *Viveash v. Becker* (h); *Lockwood v. Coysgarne*. (i) That statute, after reciting the insult committed on the *Russian* Ambassador by publicly arresting him (k), “in contempt of the protection granted by her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public ministers, authorised and received as such, have, at all times, been thereby possessed of, and ought to be kept sacred and inviolable,” *declares* that all writs “whereby the person of any ambassador, or other public minister of any foreign prince or state, authorised and received as such by her Majesty, her heirs or successors, or the *domestic* or *domestic servant* of any such ambassador, or other

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(a) A cross bill is not liable “to pleas to the jurisdiction of the Court and pleas to the person of the Plaintiff, the sufficiency of which seem both affirmed by the original bill.” *Redesd.* 291. *Cooper Pldg.* 304. (b) 1 *Cl. & Fin.* 354.

(c) 1 *Dow & Cl.* 174. (d) 1 *Sim.* 94. (e) 4 *Inst.* 153. (g) 7 *Ann. c. 12.* (h) 3 *M. & Sel.* 292—298. (i) 3 *Bur.* 1676. (k) See 1 *Blackstone's Comm.* 255.

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other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void."

If "by the common law and the law of nations" as declared by that statute, the meanest of the ambassador's retinue be privileged, how can it be maintained that the sovereign himself, whom the ambassador represents, is, by that law, entitled to less respect?

Considerations of public policy must not be disregarded in this question; what then would be the consequence of holding a contrary doctrine? If an independent foreign sovereign be subject to the jurisdiction of this Court, he must be liable to the consequences of a disobedience to its process, decrees, and orders; he must necessarily be liable to be attached and subject to personal restraint and incarceration. His imprisonment would cause the suspension of the functions of his government, and such an act of outrage and aggression committed against a sovereign personally, and through him against his subjects, would inevitably be regarded by them as a *casus belli*.

The Defendant happens to be a peer of parliament, and as such is privileged from arrest; but suppose the King of the *Belgians* or the King of *Prussia* came to this country on the invitation of the Queen, on business of the utmost importance to the interests and peace of the two nations, or if the King of the *French*, with that reciprocity and courtesy so desirable and advantageous to both countries, were to return the Sovereign's late visit, are they and all their retinue to be subject to be thrown in prison on bailable process, issuing out of the Queen's Courts, to answer a demand to which they might

might not be liable in their own country, and which might ultimately turn out to be without foundation, would the *French* nation submit to such an insult? The friendly intercourse between sovereigns would be wholly prevented, if, by going to a foreign country, they are to render themselves liable to the most inferior courts there; the consequences to this country by countenancing such suits might be most disastrous, and the public welfare requires that those consequences should be avoided.

The mere accident of a foreign sovereign being an *English* peer does not affect the question, his higher recognised dignity must prevail, the regal character cannot be annihilated so as to enable the Plaintiff to sue a party otherwise privileged. If it were necessary, the Court would make a distinction between the acts of the Defendant done as King of *Hanover*, and those done in his quality of an *English* peer. This was done in the case of *The Nabob of Arcot v. The East India Company* (a), where the Defendants filled the double character of Sovereigns and a Trading Corporation. There the bill was dismissed, on the ground that the whole subject matter of the suit was a political, and not a mercantile transaction. Here the whole transactions took place abroad, and are of such a nature that they ought to be imputed to the Defendant's regal character.

Again,

(a) 4 B. C. C. 180. 198., and see *Moodalay v. Morton*, 1 B. C. C. 470., in which Lord *Kenyon* says, "I admit that no suit will lie in this Court against a sovereign power for any thing done in that capacity; but I do not think the *East India Company* is within that rule. They have rights as a sovereign power, they have also duties as individuals; if they enter into bonds in *India*, the sums secured may be recovered here. So in this case, as a private Company they have entered into a private contract, to which they must be liable."

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Again, if the Defendant were liable to the jurisdiction, still he came to this country by the consent of the Sovereign, and impliedly under her safe conduct, and he is entitled to the same protection as if the writ itself had been made out, in which case he would be protected from suit. (a)

Secondly, the subject matter of the suit is not one which is within the limits of forensic jurisdiction. It is one of an imperial and political nature, the guardianship is a legitimate act of state emanating from the *Germanic* body, of which *Brunswick* is a component part. The Court is incompetent to deal with it.

By the civil law, curators were appointed over prodigals as well as over lunatics. *Furiosi quoque et prodigi, licet maiores vigenti quinque annis sint, tamen in curatione adgnatorum ex lege duodecim tabularum.* (b) Previous to the dissolution of the *German* empire (c), the powers of supreme guardianship over the princes of the empire belonged to the Emperor. It afterwards devolved on the heads of sovereign states. The deed of curatorship was an act of state by the *de facto* Duke of *Brunswick* and the other *Agnati*, and followed out the decree of the *Germanic* diet and the deposition. What authority has the Rolls Court to deal with such a matter, or with the internal political arrangements of an independent state, or with the decrees of the *Germanic* diet, or the imperial powers of the *Agnati*? How can this Court take on itself to determine these state questions? If it assumes jurisdiction, it will become the arbiter of any political transactions that may have taken place abroad, although

(a) *Registrum Brevium*, 23., (b) *Justinian Inst.* lib. 1. tit. "volumus etiam quod idem W. 23. interim sit quietus de omnibus placitis et querelis," &c. (c) 1804.

although it is confessedly incompetent to adjudicate on such matters if they had taken place in this country, and although in the country in which the transactions happened the ordinary courts have no jurisdiction.

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The deed of curatorship is simply alleged to be void, but no ground is stated for that conclusion. The Court cannot take judicial cognizance of the law of a foreign country, the law itself must be stated as a fact. It is not alleged that the parties to the document were not the legitimate *Agnati*, or that they had not the powers which they assumed to exercise. In point of pleading the allegation is insufficient.

Thirdly. Independently of the privileged character of the Defendant, and the political nature of the subject, this Court has no jurisdiction in this case. Here is an act of a *forum competens* which cannot be questioned in this country; the whole matter has its locality in *Brunswick*, and there alone must the Plaintiff proceed. By the law of that country, the Plaintiff has been declared to be in such a state as to require a curator; until that decision has been reversed, he has no *locus standi* in this Court. A lunatic cannot file a bill against his committee for an account, nor can a bankrupt against his assignees; *Tarleton v. Hornby* (a); the proper proceeding is first to supersede the commission. If these transactions had taken place on *British* soil, the Plaintiff could not have maintained his bill until the deed of curatorship had been first set aside.

But supposing the deed, as is alleged, to be void, the Defendant is a mere wrong-doer. What right then has the Plaintiff to come into equity for an account, or to have a declaration that the deed is void? If void, it is

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(a) 1 *Y. & Coll.* (Exch.) 172. 333.  
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as void at law as in equity, and there is no prayer that it may be delivered up or be cancelled. This Court cannot declare the invalidity of the deed. It would first be necessary to enter into the legality of the deposition and the rights of the *Agnati*. As to the account, a party cannot treat an instrument as invalid, and yet seek an account under it, on the footing of its validity. If the deed be void, there exists no fiduciary relation to support such relief, and it would be perfectly impossible for the Master to take such an account, even if it were directed.

The bill too is multifarious, and seeks an account of the receipts of the Duke of *Cambridge* in his absence.

Mr. *Kindersley*, Mr. *Turner*, and Mr. *Heathfield*, *contra*, in support of the bill.

There is no instance in Lord *Redesdale's Treatise*, or in any other work, in which a Defendant has claimed an immunity from suit by demurrer. If a Defendant pleads to the jurisdiction, he must shew what other Court has jurisdiction; *The Earl of Derby v. The Duke of Athol.* (a)

Here the Defendant has submitted to the jurisdiction of the Court by appearing. If he wished to question the regularity of the process, he ought to have entered a conditional appearance with the Registrar, and have sought to discharge it; *Davidson v. The Marchioness of Hastings.* (b) It is now too late, and the point has in fact been determined by the Lord Chancellor, who, after argument, and after the same points had been brought to his notice, determined that the letter missive had issued properly, and refused to recall it.

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(a) 1 *Ves. sen.* 201.

(b) 2 *Keen*, 509.

It is not necessary to decide the general question, whether an independent foreign sovereign coming into this country is liable to the process of the Court, for here both parties, Plaintiff and Defendant, are *British* subjects; the Defendant by reason of the Act of *Ann* (a), which enacts, "that the Princess *Sophia*, Electress and Duchess Dowager of *Hanover*, and the issue of her body, and all persons lineally descending from her born or thereafter to be born, be and should be, to all intents and purposes whatsoever, deemed, taken, and esteemed natural born subjects of this kingdom, as if the said Princess and the issue of her body, and all persons lineally descending from her, born or thereafter to be born, had been born within this realm of *England*, any law, statute, matter, or thing whatsoever to the contrary notwithstanding." The Defendant, on the other hand, is a natural born subject; he is a Peer of the realm, and since his accession to the crown of *Hanover*, has exercised his rights as a Peer. Having been born a *British* subject, he cannot put off his allegiance (b); but here he has since confirmed it, by taking the oath of allegiance to her present Majesty; he has voluntarily submitted to the Queen's jurisdiction, and is as liable to the Queen's writs as was *Baliol* King of *Scotland* to *Edward* the First, or *Edward* the First to *Philip le Bel* of *France*.

It is admitted that a foreign sovereign can sue in the courts here; then, *a priori*, and independent of authority, one would say, that if he has a right to sue, he had a correlative liability to be sued.

There is, however, authority for saying that the sovereign

(a) 4 *Ann. c. 4.*

(b) 1 *Bl. Com. 369.*

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sovereign of a foreign country is liable to be sued. In *Calvin's Case* (a) it is said: "But yet there is a diversity in our books worthy of observation; for the highest and lowest dignities are universal: for if a king of a foreign nation come into *England*, by the leave of the king of this realm (as it ought to be) in this case he shall sue and be sued by the name of a king; and herewith agreeth, 11 *E. 3. tit. Br.* (b) 473., where the case was, that *Alice*, which was the wife of *R. de O.*, brought a writ of dower against *John Earl of Richmond*, and the writ was *Præcip. Johann' Comiti Richmondie custodi terr' et hæredis* of *William* the son of *R. de O.*: the tenant pleaded that he is Duke of *Britain*, not named duke, judgment of the writ? But it is ruled that the writ was good; for that the dukedom of *Britain* was not within the realm of *England*. But there it is said, that if a man bring a writ against *Edward Baliol* (c), and name him not King of *Scotland*, the writ shall abate for the cause aforesaid."

*Selden*, in his *Table Talk* (d), mentions an instance of the King of *Spain* being outlawed. He says: "The King of *Spain* was outlawed in *Westminster Hall*, I being of council against him. A merchant had recovered costs against him in a suit, which because he could not get, we advised to have him outlawed for not appearing, and so he was. As soon as *Gondimar* heard that, he presently sent the money, by reason, if his master had been outlawed, he could not have the benefit of the law, which would have been very prejudicial, there being then many suits depending betwixt the King of *Spain* and the *English* merchants."

Sir

(a) 7 *Rep.* 15 b.(b) *Moore*, 803.(c) *Ibid.*(d) *Selden's Works*, vol. vi.2041. See also the case of *Ericus*King of *Norway*, before *Edward*the 1st, *Ryley*, *Placita Parlia-**mentaria*, 143.

Sir *John Leach* was of opinion, that a foreign sovereign could both sue and be sued. In *Hovenden's Supplement to Vesey junior* (a), it is stated, in a note to the case of the *Nabob of the Carnatic v. The East India Company*, “That a political treaty, between sovereigns, or parties exercising sovereign authority, cannot be the subject of municipal jurisdiction; but that its observance, or neglect, must depend on that respect which the parties bound thereby can be made to feel for the *jus gentium*, is established by the final result of this case. Lord *Rosslyn* even thought it doubtful, whether, in any case, a foreign sovereign could sue or be sued, in a municipal court of this country; *Barclay v. Russell* (b); but, in *De la Torre v. Bernales*, Sir *John Leach* V. C. (on the 22d April 1818) ordered the King of *Spain* to be named as a party to that suit, the object of which was to charge the Defendant, *Bernales*, in respect of acts done by him as agent of that king: and on a subsequent occasion (18th March 1819), when the same cause was under discussion, his Honor distinctly laid it down, that a foreign government, or sovereign, could both sue and be sued in the courts of this country. This determination is perfectly consistent with the principal case, understanding the Vice-Chancellor to allude, not to federal agreements bearing a political character, but only to personal demands of a private nature, and to cases where the fund, or the accountable parties, are within reach of the jurisdiction.”

In the cases of *Hullett v. The King of Spain* (c), and *Glyn v. Soares* (d), a sovereign was made a Defendant.

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(a) Vol. i. 149.  
 (b) 3 *Ves.* 431. 433.  
 (c) 4 *Russ.* 225. & 560., 1 *Dow.* & *Cl.* 169., 2 *B&L.* (N. S.) 51., 1 *Myl. & K.* 7. *n.*, 1 *Cl. & Fin.* 333., and 7 *B&L.* 359.  
 (d) 1 *Y. & Col.* (Exch.) 644., and 7 *Cl. & Fin.* 466.

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ant. If this case depended on the Defendant's submitting to the jurisdiction, he has done so. He is, at the present moment, the Plaintiff in a suit in this Court; *The King of Hanover v. Wheatley.* (a) The Queen herself, by a particular process, is liable to suit in this country: it would be absurd to place the Defendant in a better situation. It has been determined that a question concerning the right to the *Isle of Man* may be determined here; *The Earl of Derby v. The Duke of Athol.* (b)

The instances of ambassadors do not apply: their immunity arises from the necessity of their perfect freedom when negotiating between two countries. It is not suggested that the Defendant came here for any such a purpose, or otherwise than to exercise his rights of *British* subject as a Peer of the realm. The Defendant claims an entire immunity, but ambassadors are not in all cases privileged, as if they are traders (c), or are subjects of the country to which they are accredited.

It is said that the consequences of the restraint to which sovereigns would be exposed on a disobedience to the process should prevent this Court interfering. The same reason would apply to cross bills, in which cases it is admitted that a Sovereign is liable to suit, but that reason does not prevail; the Court might modify its process of contempt, as in the case of Peers, and might enforce obedience, and give relief by means of a sequestration against the goods of a royal Defendant.

It is said to be matter of state. The decree of the *Germanic*

(a) 4 *Beavan*, 78.

(b) 1 *Ves. sen.* 201.

(c) 1 *Bl. Com.* 280.

Germanic diet, or the dethronement in consequence of it, might be so, but the deed of curatorship has no reference whatever to the former ; it is quite independent. The Defendant and his agents have taken possession of the property of the Plaintiff, and is he not to be accountable for it ? But matters of state are constantly inquired into, as in the cases of ship-money (a), general warrants, *Money v. Leach* (b), and *French* compensation fund. (c)

The argument as to safe conduct does not apply, that writ is only granted in times of war ; in the present case no such writ is in existence.

Sir C. Wetherell, in reply.

The following authorities were also referred to in the course of the argument : *Novello v. Toogood* (d), *Melan v. The Duke of Fitzjames* (e), *De la Vigna v. Vianha* (g), *Story's Conflict of Laws*, 244. 322.; *Don v. Leppmann* (h), *Allen v. Macpherson* (i), *Corporation of Carlisle v. Wilson* (k), *Grotius*, b. 2. c. 14., and the proceedings on the case concerning the King's prerogative in respect to the education and marriage of the Royal family (1718). (l)

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It is due to the great learning and ingenuity which have been brought to bear upon the important question raised in this case, and to the great extent and variety of the legal, historical, and political arguments used, that I should take time to consider of the judgment which I shall pronounce upon it.

The

(a) 3 <i>State Trials</i> , 826.	(g) 1 <i>B. & Ad.</i> 284.
(b) 1 <i>W. Blackstone</i> , 555.	(h) 5 <i>Cl. & Fin.</i> , 1.
(c) <i>Hill v. Reardon, Jacob.</i> 84.	(i) <i>Phillips</i> , 133., & 5 <i>Beavan</i> .
(d) 1 <i>Barn. & C.</i> 554.	(k) 13 <i>Ves.</i> 276.
(e) 1 <i>Bos. & P.</i> 138.	(l) 15 <i>State Trials</i> , 1195.

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This case came on to be heard for argument, on a demurrer to the bill for want of jurisdiction and for want of parties.

The bill is filed by His Serene Highness *Charles Frederick William Augustus* Duke of *Brunswick* against His Majesty the King of *Hanover*, who is sued as His Royal Highness *Ernest Augustus* Duke of *Cumberland* and *Teviotdale* in *Great Britain*, and Earl of *Armagh* in *Ireland*.

The bill prays, that it may be declared that a certain instrument or writing, in the bill mentioned to be dated the 6th day of *February* and the 14th day of *March* 1833, and the appointment of His Royal Highness the Duke of *Cambridge* as guardian of the fortune and property of the Plaintiff, thereby purported to be made, and of the persons purported to be appointed administrators and managers under him, and the subsequent appointment of the Defendant as such guardian, are absolutely void and of no effect; and that it may be declared that the Defendant is liable and ought to account to the Plaintiff for the personal estate, property, and effects, and the rents, profits, and produce of the sale of the real estate of the Plaintiff possessed by the Defendant, or any person by his order or for his use, or any person having acted or purported to act under any appointment as administrator or manager under the Defendant, since his appointment as guardian by virtue of the instrument of the 6th of *February* and the 14th of *March* 1833, including therein the personal estate and effects, rents, profits, and produce of the real estate paid or accounted for to the Defendant by the Duke of *Cambridge*; and that such accounts may be accordingly taken

taken — the Plaintiff offering, on the taking of such accounts, to make the Defendant all just allowances.

For this purpose, the bill states, that in the year 1830, the Plaintiff was the reigning duke of the Duchy of *Brunswick*, and was, in his private character or capacity, possessed of or entitled to real and personal property in *Brunswick*, and in *England*, *Hanover*, *France*, and elsewhere in *Europe*, to a very considerable value: that the Duchy of *Brunswick* borders on the kingdom of *Hanover*; and that in the month of *September* 1830, his late Majesty King *William* the Fourth was King of *Hanover*, and His Royal Highness *Adolphus Frederick* Duke of *Cambridge* was Viceroy of *Hanover*, acting under the authority of His late Majesty King *William* the Fourth: that pending a revolutionary movement in *Brunswick*, a decree of the *Germanic Diet of Confederation* was made on the 2d of *December* 1830, whereby the Plaintiff's brother, *William Duke of Brunswick*, was invited to take on himself provisionally the government of the duchy; and the Diet left it to the legitimate dynasty of the Plaintiff to provide for the future government of the duchy; and that in *February* 1831, His late Majesty King *William* the Fourth, and *William Duke of Brunswick*, claiming to be the legitimate *Agnati* of the Plaintiff, caused to be published a declaration whereby they purported to dethrone the Plaintiff from the throne of the duchy, and declared that the throne had passed to Duke *William*; and that after this declaration was made, it was signed by their Royal Highnesses the Duke of *Cumberland*, (the present Defendant,) the Duke of *Cambridge*, and the Duke of *Sussex*; and that in pursuance of the declaration, *William Duke of Brunswick* took upon himself the government of the duchy, and he has ever since exercised the rights, powers, and authorities of Sovereign Duke of *Brunswick*.

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The bill then proceeded to state, that early in the year 1833 an instrument in writing, dated the 6th of *February* and the 14th of *March* in that year, signed by His late Majesty King *William* the Fourth, and by *William* Duke of *Brunswick*, was promulgated by them, and was to the effect following: viz.

“ We, *William* the Fourth, by the grace of God, King of the United Kingdom of *Great Britain* and of *Ireland* and of *Hanover*, *Duke of Brunswick* and of *Lunebourg*, and we *William*, by the grace of God, Duke of *Brunswick* and of *Lunebourg*, make known what follows: — Moved by the interests of our House, whose well-being is confided to us, and yielding to a painful but inevitable necessity, have thought it necessary to consider what measures the interests (rightly understood) of His Highness *Charles* Duke of *Brunswick*, the preservation of the fortune now in his hands, the dangers and illegality of the enterprises pursued by the said Duke, and, lastly, the honour and dignity of our House, may require; and after having heard the advice of a commission, charged by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law: and whereas after the dissolution of the *German* empire, the powers of supreme guardianship over the princes of the empire, which, up to that period, had appertained to the Emperor, devolved on the heads of sovereign states, we, taking into consideration the laws and customs, and by virtue of the rights unto us belonging, in quality of heads of the two branches of our House, have decreed as follows: —

“ Article 1st. Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that His Highness Duke *Charles* is at this time wasting the fortune which he possesses in enterprises alike

alike impossible and dangerous both to himself and other persons, and is seeking to damage the just claims which certain persons interested now or hereafter may legally have upon his property, we have consequently considered that the only method of preserving the fortune of His Highness Duke *Charles* from total ruin is to appoint a guardian over him.

“ Article 2d. In consequence of this conviction, we decree that *Charles* Duke of *Brunswick* shall be deprived of the management and administration of his fortune, a guardian shall be appointed, whom we shall choose by mutual consent from amongst the very noble or noble male scions of our House, although the right of choice belongs to the legitimate sovereign of the duchy of *Brunswick*, in virtue of his title alone.

“ Article 3d. His Royal Highness the Duke of *Cambridge*, Viceroy of *Hanover*, having declared that he will willingly accept such guardianship, we confide the same to His Royal Highness by the present decree, which he will be pleased to consider as constituting his title to such guardianship.

“ Article 4th. As His Royal Highness the Duke of *Cambridge* cannot, by reason of his position, by himself alone exercise the functions of guardian, he is authorised to limit himself to the functions of supreme guardian, and to substitute for the management and administration of the property one or more persons, who, under oath, will proceed in their own name, and on their own personal responsibility, to make an inventory of the same, and to take measures for the preservation and administration of the fortune placed under the guardianship of His Royal Highness, the supreme guardian,

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dian, who is to be at liberty to grant to them fees proportionate to their duties.

“ Article 5th. The administrators shall render an annual account of their management to His Royal Highness, the supreme guardian, who shall be asked to transmit the same to us, that we may cause the same to be settled and approved. Our confirmation shall be applied for in all cases wherein the laws require the consent of the supreme guardian.

“ Article 6th. The guardianship is to be considered as legally established in *Brunswick*, where it is to have its locality.

“ Article 7th. The present decree shall be published in the bulletin of the laws of the kingdom, in accordance with the usual forms; and all whom the same may concern are bound to render obedience thereto.

“ Given at our palace of *St. James's*, the 6th of *February* 1833, and at *Brunswick* the 14th of *March* 1833. We have signed with our proper hands and have placed our seal.

“ *William* (L.S.)

“ *William Duke* (L.S.)”

“ The Baron *Ompteda de Schleinitz*.”

To this instrument was subjoined a note, which was signed by the Defendant, then Duke of *Cumberland*, and by the Dukes of *Sussex* and *Cambridge*, to the effect following: — “ The undersigned have acknowledged with gratitude the foregoing arrangement adopted by His Majesty, in accordance with His Highness the reigning Duke of *Brunswick*, in the interests well advised of His Highness the Duke *Charles* of *Brunswick*, for the  
pre-

preservation of the fortune remaining in his hands, for the maintenance of the public peace in the duchy of *Brunswick* and in the kingdom of *Hanover*, and for the honour and dignity of the great House of *Brunswick Lunebourg*, another proof of the foresight of His Majesty and of His Highness for the well-being of that House: we solemnly attest this declaration by these presents, signed with our hands, and to which we have placed our seals. *London, 6th February 1833,* *Ernest, (L.S.) Kensington, 3d February 1833,* *Augustus Frederick, (L.S.) Hanover, 13th February 1833,* *Adolphe, (L.S.)*."

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The bill then states that the Plaintiff is advised, as the fact is, that the said instrument is absolutely void and of no effect; but that nevertheless the Duke of *Cambridge* accepted the appointment of supreme guardian of the Plaintiff's fortune and property, took possession of the real estates to which he was entitled in his private capacity at *Brunswick*, and took possession of all such parts of the Plaintiff's property in *Brunswick* and elsewhere, of a personal nature, as he could discover, to the amount of several hundred thousand pounds in the whole: that he sold and converted several parts thereof into money, and made certain payments on account of the Plaintiff and of his property; but that after allowing for such payments, there remained in his hands a very large surplus unaccounted for: that King *William* the Fourth died on the 20th of *June* 1837, and thereupon the present Defendant became King of *Hanover*; and the Duke of *Cambridge* having resigned his appointment of guardian by some instrument in writing, to which the Defendant was a party, and which was signed by him and by *William* Duke of *Brunswick*, the Defendant was purported to be appointed guardian of the Plaintiff, and of his fortune and property,

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party, in the place of the Duke of *Cambridge*, under the instrument of the 6th of *February* and the 14th of *March* 1833, and with all the same powers and authorities as were thereby purported to be conferred on the Duke of *Cambridge*: that the Duke of *Cambridge* accounted for his receipts and payments to the Defendant, and paid him the balance; and that the Defendant took possession of the Plaintiff's property, and he received large sums of money on account thereof, and has thereout made some payments on account of the Plaintiff; but that a very large balance or surplus, to the amount of several hundred thousand pounds, remains due from the Defendant to the Plaintiff on account thereof; and that the Defendant refuses to comply with the Plaintiff's application for an account thereof.

The bill charges, that the instrument of the 6th of *February* and the 14th of *March* 1833, and the appointment of the Duke of *Cambridge* as guardian, and the appointment of the Defendant as guardian, are wholly invalid, according to the laws as well of *Brunswick* and of *Hanover* as of *Great Britain*; but that under colour thereof, the Duke of *Cambridge* and the Defendant respectively took possession of the Plaintiff's property, on his behalf, and not adversely: that by the law of *England*, such appointments of guardians, and all the rights thereby purported to be given, are void, even if the same were valid by the law of *Brunswick*; and that if the same were valid at the time when the same issued, having regard to the circumstances and situation of the Plaintiff at the time (which, however, the Plaintiff denies), there is now nothing in the circumstances, or conduct, or state of mind of the Plaintiff, to debar him from the full right and power of enjoyment and disposition of his property.

There

There is a charge, that the receipts and payments by the Duke of *Cambridge* and the Defendant respectively, on account of the Plaintiff and the management of his property, constitute a mutual account, containing many items as well on the debit as on the credit side thereof; that such account is still open and running, and is of an intricate and complex nature, and can only be taken in a court of equity.

There are also charges relating to the administrators and managers who were appointed by the Duke of *Cambridge*, and are alleged to have accounted to the Defendant, and a very long statement of certain proceedings in *France*, in which it is alleged, that the Duke of *Cambridge* attached, but failed in an attempt to establish a claim to the Plaintiff's property in that country; a specification of certain property alleged to have been seized by the Duke of *Cambridge* and the Defendant respectively; and the statement of a transaction alleged to have taken place at *Osterode* in *November* or *December* 1830.

The Plaintiff having, in an earlier part of the bill, stated, that from a time previous to the Duke of *Cambridge* resigning the appointment of guardian, until within a few weeks past, the Defendant had been residing in *Hanover*, out of the jurisdiction of this Court, and having charged that he the Plaintiff was resident and domiciled in *England*; and that the Plaintiff and Defendant were respectively subjects of the Crown of *Great Britain* and *Ireland*, concludes the charging part of his bill by charging, that the Defendant is a Peer of this realm, and that his title as such is His Royal Highness *Ernest Augustus* Duke of *Cumberland* and *Teviotdale* in *Great Britain*, and Earl of *Armagh* in *Ireland*; and that since his arrival in this country, and during his residence

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residence here, he had exercised, and then exercised his rights and privileges as such Peer as aforesaid.

It has been stated to me as a fact on both sides, that the Plaintiff availed himself of a temporary residence of the Defendant in this country to serve him here with the process of this Court; and that the Defendant, before he appeared to the bill, and consequently before the demurrer was filed, applied to the Lord Chancellor to be relieved from the process; that the Lord Chancellor refused the application; and that thereupon the Defendant appeared to the bill in the usual manner: and upon this state of things the Plaintiff has founded an argument, which, if valid, would make it unnecessary for me to consider the principal question upon the demurrer. The Plaintiff has contended, first, that the appearance of the Defendant to the process ought to be deemed a waiver of any claim to personal exemption from liability to be sued; and, secondly, that the refusal of the Lord Chancellor to relieve the Defendant from the process ought to be considered by me as a decision of the Lord Chancellor that the Defendant is subject to the jurisdiction of this Court with reference to the subject-matter of this bill.

As to the first of these points, it would be singular if appearance, which is the first step towards making a defence, should be deemed an abandonment or waiver of any defence which the Defendant may have. An appearance may be a waiver of any mere irregularity in the service of process; but I am of opinion, that it is no waiver of such a defence as is now made, and which the Defendant has clearly a right to submit to the consideration of the Court. He claims to be exempt from liability to be sued; but he nevertheless appears, in order that he may, in a regular manner, inform the

Court

Court of the reasons upon which his claim is founded. As to the other point, it appeared to me very improbable that the Lord Chancellor, in refusing to stay the process upon a bill, the contents of which were not regularly known to him, could have meant to decide that the defendant was, with reference to the contents of the bill, liable to the jurisdiction of the Court. Upon this part of the case I have, however, thought it right to communicate with the Lord Chancellor, who has informed me, that in declining to interfere with the process, he did nothing which could in any way prevent the Defendant from making any defence which was open to him in the usual course of proceeding; and gave no opinion upon the question of jurisdiction in the particular case.

It is, therefore, incumbent upon me to consider the defence made to this bill by the present demurrer.

In support of the demurrer for want of jurisdiction, the following are amongst the principal propositions advanced on behalf of the Defendant:—

First, he is admitted by the bill to be King of *Hanover*, a sovereign prince, recognised as such by the Crown of *England*. As a sovereign prince, his person is inviolable, and he is not liable to be sued in any court.

Second, the inviolability of a sovereign prince is not confined to his own dominions, but attends him everywhere. (a) Though a king be in a foreign kingdom, yet he is judged in law a king. (b)

Third,

(a) *Jurisconsulti melioris notæ negant Principem extra dictiōnem suam mere privatum esse, &c.*
Zouch, 63.

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Fourth, even if the Defendant should be held liable to be sued for some things in this country, he ought not to be held liable to be sued in respect of the particular subject matter of this suit, which is alleged to be matter of state, and not matter of forensic jurisdiction.

Fifth, and last, even if the Defendant should be held to be liable to be sued here, and if the subject matter of the suit should be held to be matter of forensic jurisdiction, yet that it is not matter subject to the jurisdiction of this Court, but is matter which must be deemed to be subject to the jurisdiction of some Court of special and peculiar jurisdiction, such as in this country are matters arising in lunacy, bankruptcy, and various other matters, which, although proper subjects of forensic jurisdiction, can only be adjudicated upon in courts specially appointed for the purpose.

On the other hand, the following are amongst the principal propositions advanced in support of the bill on behalf of the Plaintiff: —

First, this ought to be considered as an ordinary suit between subject and subject. The Plaintiff and the Defendant are lineal descendants of the Princess *Sophia*, Electress and Duchess Dowager of *Hanover*, and as such (a) are, to all intents and purposes, to be deemed natural-

(a) 4 *Ann. c. 4.*

natural-born subjects of this realm. The Plaintiff is domiciled here. The Defendant was born here, is an *English* peer, and has taken the oath of allegiance. (a)

Second, no *English* subject can withdraw from his allegiance and subjection to the laws of the land. (b) His becoming a sovereign prince of another country can make no difference in this respect: he remains an *English* subject, and is bound to obey the laws of *England*.

Third, the law of *England* affords no authority for the proposition, that sovereign princes resident here may not be sued in the courts here; and there are dicta to the contrary; as in *Calvin's Case* (c) it is said, that "if a King of a foreign nation come into *England* by the leave of the King of this realm, as it ought to be, in this case he shall sue and be sued in the name of King;" and it is reported, in the case of *De la Torre v. Bernales* (d), that Sir *John Leach* stated it to be his opinion that foreign sovereigns could both sue and be sued in this country. In support of this proposition, reference was made to proceedings (e) in which *John Baliol*, King of *Scotland*, was summoned to answer charges made against him in the court of *Edward I.*, King of *England*; and to proceedings in which *Edward I.*, King of *England*, was summoned to answer charges made against him in the court of *Philip le Bel*, King of *France*, at *Paris*. But these cases have nothing to do with the question: they were respectively adopted in virtue of, and for the purpose of enforcing the feudal superiority which *Edward I.*

claimed

(a) 1 *G. 1. st. 2. c. 13.*

(e) *Ryley, Pl. Parl. 154. et seq.*

(b) *Foster, Cr. L. 60. 184., 1 Bl. Com. 370., Moore, 798.*

3 *Brady, 18. et seq., 3 Tyrrell, 62. et seq., 2 Carte, 226.*

(c) 7 *Coke, 15.*

231, 232., 1 *Tyler, c. 2.*

(d) 1 *Hov. Supp. 149.*

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claimed to have over the kingdom of *Scotland*, and the superiority which the King of *France* had over the province of *Guienne*.

Fourth, liability to suit does not necessarily involve liability to coercion. The Defendant, as an *English* peer, is, by privilege, protected from personal coercion; and even if a sovereign prince without such peculiar privilege were a Defendant here, this Court has power so to modify its process, as at the same time to do justice to the Plaintiff and have due regard to the person and dignity of the Defendant.

Fifth, the law of nations, the general law and the common interest of all mankind, is, that justice should be done all over the world. The right of a suitor here is not to be impeded by the assertion of an unrecognised privilege in any person against whom he has a legal demand.

Sixth, the Queen of *England* is liable to be sued in a proper form — a form not applicable to a foreign sovereign; but if a foreign sovereign were not liable to be sued here, he would be placed in a better situation than our own sovereign, which, it is said, would be absurd.

These propositions are all of them more or less important to be considered on the present occasion, and I have thought it convenient to enumerate them, although I shall not have occasion to observe upon them all, in stating the grounds of the opinion which I have formed upon this demurrer.

The general proposition of the Defendant is, that by reason of his character of a sovereign prince, he is  
exempt

exempt from the jurisdiction of any tribunal or court in this country.

His limited or modified proposition, adapted to the specialties of the present case, is, that he is exempt from the jurisdiction of any tribunal in this country in respect of acts done in a foreign country, under foreign authority, and in no way connected with his own character of *English* peer and *English* subject.

It has been fully established (*a*) that a foreign sovereign may sue in this country both at law and in equity; and further, that if he sues in a court of equity, he submits himself to the jurisdiction of the Court. A cross bill may be filed against him, and he must put in his answer thereto, not by any officer, agent, or substitute, but personally, upon his own oath. *The King of Spain v. Hullett.* (*b*)

Lord Redesdale (*c*) considered, that to refuse a foreign sovereign the right of suing in our courts might be a just cause of war; and the liability of a foreign sovereign to be sued in a case where he himself was suing here, was considered to be founded upon the principle that by suing here he had submitted himself to the jurisdiction of the Court in which he sued. The decision is in accordance with the rules of the civil law. The *Recontentio* is a species of defence, and “ *Qui non cogitur*

(*a*) *The King of Spain v. Machado*, 4 Russ. 560.; *Hullett v. The King of Spain*, 2 Bl. N. S. 31.; 1 Dow & Cl. 169. And see *Roi d'Espagne v. Pountes*, *Rolle's Abr.* tit. *Court de Admiratie*, E. 3.; 1 *Rolle's Rep.* 133.; *Bulstrode*, 322.; *Hobart*, 78. 113.; *Moore*, 850.; *Barclay v. Russell*, 5 Ves. 432., and *Dolder v. Lord Huntingfield*, 11 Ves. 283. (*b*) 1 Cl. & Fin. 533., and 7 Bl. 359. (*c*) 2 Bl. N. S. 60.

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*cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem judicem mitti. (a)*

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In the case of *Glyn v. Soares* (b), it was supposed that a person who was not a party to an action, but whose agent was, on his behalf, the Plaintiff, might be made a Defendant to a bill in equity, for discovery in aid of the defence to the action, and on that supposition it was held that the Queen of *Portugal* was properly made a Defendant to the bill. Her demurrer, however, was allowed in the House of Lords (c), where it was held that such a bill of discovery could only be sustained against parties to the action. If she had been Plaintiff in the action, I presume that she would have been held to be a proper Defendant to the bill.

The case mentioned by *Selden* in his *Table Talk* (d), was probably of the same sort: there were many suits pending between the King of *Spain* and *English* merchants; a merchant had recovered costs against him in a suit, and could not get them, and process of outlawry was taken out against him for not appearing; but the circumstances are not stated with such particularity as to make it practicable to draw any conclusion from them.

The cases which we have upon this point go no further than this; that where a foreign sovereign files a bill, or prosecutes an action in this country, he may be made a Defendant to a cross bill or bill of discovery in the nature of a defence to the proceeding, which the foreign sovereign has himself adopted. There is no case to shew that, because he may be Plaintiff in the courts of this

(a) 1 *Digest*, l. 22., *Corpus Juris Civilis*, 131. (c) 7 *Cl. & Fin.* 466.  
 (b) 1 *Y. & Col. (Exch.)* 644. (d) *Law 3.*

this country for one matter, he may therefore be made a Defendant in the courts of this country for another and quite a distinct matter; and the question to be now determined is independent of the fact stated at the bar, that the King of *Hanover* is or was himself Plaintiff in a suit for an entirely distinct matter in this Court.

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There have been cases, in which this Court being called upon to distribute a fund in which some foreign sovereign or state may have had an interest, it has been thought expedient and proper, in order to a due distribution of the fund, to make such sovereign or state a party. The effect has been, to make the suit perfect as to parties, but as to the sovereign or state made a Defendant in cases of that kind, the effect has not been, to compel, or attempt to compel, such sovereign or state to come in and submit to judgment in the ordinary course, but to give the sovereign an opportunity to come in to claim his right, or establish his interest in the subject matter of the suit. Coming in to make his claim, he would, by doing so, submit himself to the jurisdiction of the Court in that matter; refusing to come in, he might perhaps be precluded from establishing any claim to the same interest in another form. So where a Defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit would not be perfect as to parties, unless the foreign sovereign were formally a Defendant, and by making him a party, an opportunity is afforded him of defending himself, instead of leaving the defence to his agent, and he may come in if he pleases; in such a case, if he refuses to come in, he may perhaps be held bound by the decision against his agent.

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There may be other cases in which sovereign princes, for the sake of having a claim or right determined, may have been afforded an opportunity of appearing, and may have voluntarily appeared as Defendants before the tribunals of this country, but, save in the case of a cross bill or bill of discovery in aid of a defence, and in the case of a sovereign prince voluntarily coming in to make or resist a claim, it does not appear how he can be effectually cited, or what control the Court can have over him or his rights; and no case has been produced in which it has been determined that a foreign sovereign, not himself a Plaintiff or claimant and insisting upon his alleged right to be exempt from the jurisdiction of the ordinary courts, has been held bound to submit to it.

On the other hand, no case has been produced in which, upon the question properly raised, it has been held that a sovereign prince, resident within the dominions of another prince, is exempt from the jurisdiction of the country in which he is. In the case of *Glyn v. Soares* (a) the question was not mooted at the bar, but Lord *Abinger* took it into consideration, and distinctly expressed his opinion that, as a general proposition, a sovereign prince could not be made amenable to any court of judicature in this country; and upon this occasion, the Defendant insists upon it as a general rule, that in times of peace at least, a sovereign prince is, by the law of nations, inviolable; that obvious inconveniences and the greatest danger of war would arise, from any attempt to compel obedience to any process or order of any court, by any proceeding against either the person or the property of a sovereign prince; and indeed that any such attempt would be deemed a hostile

(a) 1 *Y. & Col. (Exch.)* 698.

hostile aggression, not only against the sovereign prince himself, but also against the state and people of which he is the sovereign: that it is the policy of the law (to be every where taken notice of), that such risks ought to be avoided, and that this view of the subject ought of itself to induce the Court to allow this demurrer.

If a foreign sovereign could be made personally amenable to the courts of a country in which he happened to reside, he must be subject to the ordinary process of the courts, and if not protected by any privilege legally established by the law of *England*, he would, in this country, be subject to the execution of writs of attachment and *ne exeat regno*, and other processes upon which he might be arrested, and upon this the counsel of the Defendant cited the opinion of *Vattel*, who considered it to be a ridiculous notion, and an absurdity to think that a sovereign who enters a foreign country, even without permission, might be arrested there. (a)

It was attempted to meet the force of this argument, by alleging that this Court had authority to modify the means of executing its process, and compelling obedience to its orders, so as to suit the rank or dignity of particular Defendants; but this allegation was not supported by any authority, or by reference to any known law or practice of the Court. In the case of the King of *Spain* it was stated (b), that his right, "in respect of privilege, was not greater than that of any of his subjects:" and the Lord Chancellor said, "The King of *Spain* sues here by his title of sovereign, and so he must be sued, if at all; but beyond the mere name of sovereign

(a) *Vattel*, IV. 7. s. 108. p. (b) 7 *Bl. 392.*

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sovereign it has no effect. He brings with him no privileges which exempt him from the common fate of other suitors." I am of opinion that the only exemptions from the ordinary effects of the process of this Court, are privileges which have a recognised legal origin, and that no others can be allowed.

To shew that a sovereign prince carries his prerogative with him into the dominions of other princes, reference was made to the case of *Ingelram de Nogent*, stated in *Fleta*. (a) This man was an attendant upon *Edward I.*, King of *England*, when in *France*: he committed a theft there, and was apprehended for it by the *French*, but the King of *England* required to have him redelivered, being his subject, and of his train, and after discussion in the parliament of *Paris*, he was sent to the King of *England*, to do his own justice upon him; whereupon he was tried before the steward and marshal of the King of *England*'s house, and executed in *France*. At a more recent period, *Monaldeschi*, an attendant upon *Christina*, the abdicated Queen of *Sweden*, was, by her orders, put to death within her residence in *France* (b), a fact in itself atrocious, but which was not seriously resented by *France*; and it is said to have been afterwards defended by great authority. (c) *Bynkershoek* speaks of it thus:—" *Quod factum Galli, quamvis indignabundi, impune transmiserunt, ex potentia militari, dicet alter, alter vero ex jure gentium, ut optimum maximumque est.*" (d)

But I own that with reference to the present case, I do not attach much importance to instances of this sort.

The

(a) *Lib. 2. ch. 5. s. 9. p. 68.*, *Mort du Marq. de Monaldeschi*, and cited in *Calvin's Case*, 7 Coke, *5c., Arch. Cus. 2<sup>e</sup> Serie*, viii. 287. 15 b., and in *Moore*, 798.

(b) *Le Bel Relation de la*

*5c., Arch. Cus. 2<sup>e</sup> Serie*, viii. 287.

(c) *Leibnitz*.

(d) *Bynkershoek*, Op. II. 151.

The doctrine or fiction which has been expounded by some writers on the *Law of Nations*, under the name of extra territoriality (*a*), if it were carried out to its legitimate consequences, would, as it appears to me, render it highly dangerous for the sovereign of any country to admit within his dominions any foreign sovereign, or even any ambassador of a foreign sovereign. It is admitted, that the extent to which the doctrine should be carried out, must be subject to great modifications, and I do not think that it affords any assistance in the practical consideration of the question, what are the exemptions or privileges which ought, by the law of nations, to be allowed to a foreign sovereign temporarily resident within the dominions of another prince.

Another argument for the Defendant was, that a sovereign coming from his own dominions into this country, attending the Court of the Queen, and sitting in parliament, must be deemed to have come with the consent of the Queen, and to have been entitled to a safe conduct (*b*), which would have contained a prohibition to sue him in any court (*c*); that, therefore, the Defendant ought to be deemed to have come and resided here on the faith of such right, which he is not the less entitled to, because the letters of safe conduct were not actually applied for and issued. This argument assumes, that letters of safe conduct, such as might and lawfully ought to be issued at this time, and on the occasion of such a visit as that made to this country by the King of Hanover, would have contained a prohibition to prosecute such a suit as this.

But,

(*a*) *Martens*, 46., 1 *Wheatley*, 275.

&c., which representeth a king's person, can do it. *Co. Inst.* IV.

(*b*) As no king, &c., can come into this realm without a licence or safe conduct, so no *pro Rex*,

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(*c*) *Reg. Brev.* 26.

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But, the argument for the Defendant, which appears to me to be the most important, was founded upon analogy to the immunities of ambassadors, recognised and declared to be in accordance with the law of *England*, by the statute 7 *Ann. c. 12.*

By that statute, it was declared, "that all writs and processes sued forth and prosecuted, whereby the person of any ambassador of any foreign prince authorised and received as such by her Majesty, may be arrested or imprisoned, or his goods distrained, seized, or attached, shall be deemed to be utterly null and void;" and after a penal clause affecting any person who may sue out any such writ or process, there is a proviso, that no merchant or trader within the description of the statute against bankrupts, who puts himself into the service of any ambassador, shall have or take any benefit by the act.

It is argued, that the law of nations and the law of the land having granted such immunities to ambassadors, the mere envoys and agents of sovereign princes, cannot have refused at least equal immunities to the sovereigns themselves, on whose account the immunities to ambassadors were given. If it be right, as it is universally admitted to be, that ambassadors should have such immunities, it must *à fortiori* be right that princes should have them; and thus it is argued, that because ambassadors are held to be inviolable in the countries where they reside, princes ought also to be so.

But, on the part of the Plaintiff, this is denied, and it is said, that we must look at the reason of the law. An ambassador, who comes into a foreign state on the business of his sovereign, which cannot be transacted without

without entire freedom and independence on his part, must be allowed privileges which are in no way required for the protection or accommodation of a prince who comes on a visit of pleasure or compliment; and, moreover, that the immunity of an ambassador does not extend to every suit of every kind. There are exceptions depending on the peculiar liabilities or obligations of the person, or on the nature of the transaction; and it cannot be inferred, that because an ambassador is in some or many cases exempt from suit, that therefore a sovereign prince is exempt from suit in all cases.

The question upon the demurrer is to be determined by that which may be thought to be the law of nations applicable to the case: there is no *English* law applicable to the present subject, unless it can be derived from the law of nations, which, when ascertained, is to be deemed part of the common law of *England*.

The law of nations includes all regulations which have been adopted by the common consent of nations, in cases where such common consent is evidenced by usage or custom.

In cases where no usage or custom can be found, we are compelled, amidst doubts and difficulties of every kind, to decide in particular cases, according to such light as may be afforded to us by natural reason, or the dictates of that which is thought to be the policy of the law.

“ *Lege deficiente, recurritur ad consuetudinem, et deficiente consuetudine, recurritur ad rationem naturalem,*” and in the case now in question, it does not appear that there have been cases, or that events have occurred from

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from which any usage or custom of nations can be collected.

Bynkershoek, in his *Treatise De Foro Legatorum* (*a*), discusses the very question which is now under consideration. He supposes a sovereign prince to pass into the dominions of another prince, for any cause whatever of business or pleasure. It is not, he says, to be supposed, that the prince went there with the intent to put off his own sovereignty, and become the subject of another; yet, what is to be done, if he commits violence, or contracts debts in the country where he is; this, he says, will depend on the law of nations, adopted from reason and mutual consent, and established by usage. If we consult reason, much is to be said on either side. If a prince, in the dominions of another, becomes a robber, homicide, or conspirator, is he to escape with impunity? If he extorts money or becomes indebted, is he to be permitted to carry home his plunder? It is, he says, difficult to admit that; and yet, on the other hand, is that which reason and the consent of all nations has granted to ambassadors because they represent a prince and obey his orders, to be refused to the prince himself, perhaps transacting his own affairs? Is the sanctity of the prince less than that of his ambassador? Shall we compel the prince himself to answer when his envoy is free? The learned writer, after in vain searching for precedents, proceeds thus: — “ *Nihil in hoc argumento proficies, rebus similiter à gentibus judicatis, atque ita sola superest ratio quam consulamus. Et hac consultâ, ego non ausim plus juris tribuere in principem non subditum, quam in legatum non subditum. Quare ut extremum est in legato, ut jubeatur imperio excedere, sic et in principe statuerem, si jus hospitii violet.*

(*a*) Cap. 5. (Op. ii. 150.)

violet. In causâ æris alieni idem dixerim, nam arresto detinere principem ut æs alienum expungat, quamvis fortè stricti juris ratio permitteret, non permitteret tamen analogia ejus juris quod de legatis ubique gentium receptum est. Si neges, ubi de jure gentium agitur, ex analogiâ disputari posse, ego negaverim hanc quæstionem ex jure gentium expediri posse, cum exempla deficiant, quibus consensus gentium probetur, nec quicquam adeo supersit quam ut ad legatorum exemplum ipsos reges et principes et quidem magis, ab arresto dicamus immunes, et in eo a cæteris privatis differe."

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In a case where there is no precedent — no positive law — no evidence of the common consent of nations — no usage which can be relied on, — where reasons important and plausible are arrayed in opposition to each other, — and where no clear and decided preponderance is to be found, it seems reasonable to endeavour to borrow for our guidance such light, however feeble and uncertain, as may be afforded by analogous cases, from whence have been derived rules adopted with great, though not perfect uniformity, by all nations.

It is true, that a decision derived from principles supported by analogous cases alone, cannot be entirely satisfactory ; and yet it may be the best, the most satisfactory, which the nature of the case admits of.

It will be more satisfactory in proportion to the clearness of the analogy between the cases under consideration.

It must be admitted, that all the reasons assigned for the immunity of ambassadors are not applicable to the case of sovereign princes ; and it has been truly observed, that an ambassador, if exempt from the coercive power

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of the law in the country where he is, may, nevertheless, be compelled to submit to justice by his prince in his own country (a); but that if you exonerate the prince himself, justice fails altogether: but in ultimate effect, the cases come very nearly to the same result. The prince, not being subject to a foreign power, may refuse to compel his ambassador to do justice, or may refuse to do the justice declared by a foreign tribunal, when requested by a foreign power: and the refusal, in either case, becomes a ground of imputation against the prince who refuses, and may give rise to those irritations which are so apt to prove incentives to war. Investigate the subject as we may, considerations of this sort press upon us. Whilst a prevailing respect for humanity and justice resides in the breasts of princes, and when there is consent as to the means of ascertaining and promoting the ends of justice in particular cases, it is well; but in the last result of any inquiry on the subject, we find, that in the absence of moral sanctions and of treaty, war and reprisal (*i. e.* war again in a particular form) are the sanctions of that which is called the law of nations.

If we hold sovereign princes to be amenable to the courts of this country, the orders and decrees which may be made cannot be executed by the ordinary means. Where is the power which can enforce obedience? If accidental circumstances should give the power, and if, for the supposed purposes of justice, an attempt were made to compel the obedience of a sovereign prince to any process, order, or judgment, he and the nation of which he is the head, and probably all other princes and the nations of which they are the heads, would see, in the attempt, nothing but hostile aggression upon the inviolability which all claim as the requisite of their sovereign

(a) *II. Ward, 515, 596, 538.*

sovereign and national independence. On the other hand, if the jurisdiction of the courts against sovereign princes be excluded, we are, on the institution of a claim, very nearly, though not quite, in the state to which we are brought by the process, order, or judgment on the former supposition. The state may have to seek redress for the injured subject, and justice is to be requested from a prince or chief against whom you have no ordinary means of enforcing it. It may be refused; acquiescence in the refusal is the abandonment of justice, and pressure after refusal implies an imputation, and gives rise to discussions and irritations which may again prove incentives to war. Justice can be peaceably and effectually administered there only where there is recognised authority and adequate power. What is to be done in cases where there is no power to enforce it?

It must be admitted, that the subject is replete with difficulties. These difficulties and the importance of maintaining the legal inviolability of sovereign princes, can scarcely be shewn more strongly, than by adverting to the opinions which have been expressed by eminent jurists, that offences committed by sovereign princes in foreign states ought rather to be treated as causes of war, than as violations of the law of the country where they are committed, and ought rather to be checked by vengeance, and making war on the offender, than by any attempt to obtain justice through lawful means.

Zouch (a), says, "Ad id quod asseritur, malè cum principibus actum iri, si in eorum territoriis, aliis principibus in eorum pernitientem conjurandi licentia sit permittenda, respondeatur quod talis licentia neutquam est permittenda. Sed eos bello prosequi juri gentium consentaneum

(a) *Solutio questionis, &c. cap. IV. p. 66.*

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sentaneum est; et si cum in territorio principis in quem conjurarunt deprehensi sunt, *præsenti vindictâ uti* melius videbitur; juri gentium convenit disfidare et pro hostibus declarare unde non expectato judicio cuivis *eos interficere* impune liceat." And Bynkershoeck (a) says, "Quid si enim, more latronis, in vitam, in bona, in pudicitiam cu- jusque irruat, nec secus atque hostis captâ grassetur in urbe. Poterit utique detineri forte et occludi quamvis *per turbam malim quam* constituto judicio."

When great and eminent lawyers, men of experience and reflection, so express themselves as to shew their opinion, that less mischief would ensue from the unrestrained and irregular vengeance of individuals and of the multitude, than from attempts to bring sovereign princes to judgment in the ordinary courts of a foreign country where they have offended, however much we may lament that such should be the condition of the world, we may be sure of the sense which they entertained of the difficulty of making, and of the danger of attempting to make, sovereign princes amenable to the courts of justice of the country in which they happen to be.

After giving to the subject the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes, at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, end in requests for justice, which might

(a) Op. ii. 151.

might be made without any suit at all; that even the failure of justice, in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations, I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the courts there.

It is true, as was argued for the Plaintiff, that the common interest of mankind requires that justice should every where be done, and that, for the attainment of justice, all persons should be amenable to the courts of justice in the country where they are. Such is the general rule; but in cases where either party has no superior by whom obedience can be compelled, where the execution of justice is not provided for by treaty, and cannot be enforced by the authority of the judge; and where an attempt to enforce it by the authority of the state may probably become a cause of war; the same common interest, which is the foundation of the rule, requires that some exception should be made to it, and that exception is the general rule with respect to sovereign princes.

The question then arises, whether the exception in favour of sovereign princes, and the exemption from suit thereby allowed, is to be entire and universal, or subject to any and what limitations.

The act of parliament relating to ambassadors professes to be, and has frequently been adjudged to be, declaratory (*a*), and in confirmation of the common law; and,

(*a*) 1 *Barn. & C.* 562.

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and, as Lord *Tenterden* said, "it must be construed according to the common law, of which the law of nations must be deemed a part."

The statute does not, in words, apply to the case in which the ambassador might be a subject of the Crown of *England*; but there is an exception to the exemption in the case of bankrupts in the service of ambassadors; and cases have frequently occurred in which an ambassador has himself been a subject of the sovereign, to whom he was accredited; and, notwithstanding some differences of opinion on the subject, it seems to be considered, that such an ambassador would not enjoy a perfect immunity from legal process, but would have an immunity extending only to such things as are connected with his office and ministry, and not to transactions and matters wholly distinct and independent of his office and its duties. *Bynkershoeck* (a) thus expresses his opinion: — "Legatum scilicet manere subditum, ubi ante legationem fuit; atque adeo si contraxit, aut deliquit subesse imperio cuius antea suberat. His autem consequens est nostros subditos quamvis alterius principis legationem accipient subditos nostros esse non desinere, neque forum quo semper usi sunt jure subterfugere." And *Vattel* (b) says, "It may happen that the minister of a foreign power is the subject of the state in which he is employed, and in this case he is unquestionably under the jurisdiction of the country in every thing which does not directly relate to his ministry." And, after some discussion upon the question how we are to determine in what cases the two characters of subject and foreign minister are united in the same person, *Vattel* adds, "Whatever inconveniences may attend the subjection of a minister to the sovereign with whom he

may

(a) Op. ii. 162.

(b) Book 4. ch. 8. sec. 112.

may reside, if the foreign prince chooses to acquiesce in such a state of things, and is content to have a minister on that footing, it is his own concern."

And presuming from this view of what is considered to be the law of nations, that with respect to the immunity of an ambassador who is a subject in the country of his residence, it must be distinguished what acts of his were connected with, or required for, the discharge of the duties of his ministry, and what were not; and that with regard to acts connected with his ministry, the courts (considering his character of ambassador) would hold him to be exempt from suit; but that, with regard to acts not connected with his ministry, the courts (considering his character of subject) would hold him liable to suit. The inquiry is whether, in like manner, a sovereign prince, resident in the dominions of another prince, whose subject he is, may not justly and reasonably be held free from suit in all matters connected with his sovereignty, and his rights, duties, and acts as sovereign, and yet be held liable to suit in respect to all matters unconnected with his sovereignty, and arising wholly in the country to the sovereign of which he is a subject.

The first and most general rule is, that all persons should be amenable to courts of justice, and should be liable to be sued. A consideration of the policy of the law creates an exception in the case of sovereign princes. May not a further consideration of the policy of the law create a modification or limitation of the exception in the case of sovereign princes who are subjects?

There are in *Europe* other sovereign princes who, if not now, have been subjects of the country of their origin or adoption. Upon such a question as this,

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I cannot disregard those cases, but they may have their specialties, of which I am not aware.

I cannot venture to say, that a subject acquiring the character of a sovereign prince in another country, and being recognised as a sovereign prince by the sovereign of the country of his origin, may not, by the act of recognition, in ordinary circumstances and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed; but the case now before me must depend on its own circumstances; and I am of opinion, that it is not contrary to any principle and not unreasonable to consider, that in the contemplation of the Courts of this country, the inviolability which belongs to His Majesty the King of *Hanover* as a sovereign prince, ought to be, and is modified by his character and duties as a subject of the Queen of *England*.

Previously to his becoming King of *Hanover*, he always lived in allegiance to the Crown of *England*, and in subjection to the laws of *England*. His accession to the throne was contemporaneous with the accession of the Queen to the throne of this kingdom; and since he became King of *Hanover*, he has been so far from renouncing or from showing any desire to renounce, his allegiance to the Crown or his subjection to the laws of *England*,—he has been so far from admitting it to be questionable, whether his sovereignty, and the recognition of it by the Queen, has absolved his allegiance or his subjection to the laws of *England*, that he has renewed his oath of allegiance, and taken his seat in the *English* legislature, and has claimed and exercised the political rights of an *English* subject and an *English* peer.

If

If he came here as King of *Hanover* only, the same inviolability and privileges which are deemed to belong to all sovereign princes would have been his, and, save in peculiar cases, such as I have before referred to, he would have been exempt from all suits and legal process. But coming here, not as King of *Hanover* only, but as a subject, as a peer of the realm, and as a member of Her Majesty's Privy Council, can it be reasonably said, that he is exempt from all jurisdiction, or, in other words, from all responsibility for his conduct in any of those characters?

The law of *England* admits the legal inviolability of the sovereign, requiring, at the same time, the legal responsibility of those who advise the sovereign. Can the law of *England*, in any individual case, admit the strange anomaly of an inviolable adviser of an inviolable sovereign, of a legal subjection without any legal superiority? Can any peer or privy councillor, whatever station he may occupy elsewhere, be permitted to give advice, for which any other peer, or any other member of the Privy Council, might be justly impeached, and yet hold himself exempt from the jurisdiction of the highest tribunal in the realm? May he enter into a contract which any other subject would be compelled to perform, and yet refuse to answer any claim whatever, either for specific performance or for damages?

Great inconveniences may arise from the exercise of any jurisdiction in such a case. They arise, perhaps, inevitably, from the two characters which His Majesty the King of *Hanover* unites in his own person, and from the claim which he voluntarily makes to enjoy or exercise, concurrently, in this country, his rights as a sovereign prince, and also his rights as an *English* subject, peer, and privy councillor. He is a sovereign prince,

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and, as such, inviolable in his own dominions, and, I presume, also in the dominions of every other prince to whom he is not a subject. Remaining in his own dominions, or in the dominions of any other prince to whom he is not a subject, he would, as I presume, be exempt from all forensic jurisdiction. But he comes to this country where he is a subject, and claims and exercises his rights as such. As a subject, he owes duties correlative to which, not individuals only, but the country at large may have legal rights, which are to be respected, and being legal rights against a subject in respect of his acts and duties as a subject, it seems that they ought, if necessary and practicable, to be vindicated and enforced by the law. Those legal rights would be nugatory, if his inviolability as a sovereign prince would admit of no exception or modification. But any contradiction or inconsistency may be obviated by distinguishing, as in the analogous case of the ambassador, the acts which ought to be attributed to one character or the other ; and, it appears to me, that, when necessary, it must be the office and duty of the courts to make the distinction.

If the distinction can justly be made, why should it not, and why should not the jurisdiction be exercised, so far as the circumstances of the case will allow ?

Admitting it to be the general rule, that sovereign princes are not liable to be sued, and that all sovereign princes may consider themselves interested to maintain the inviolability which each one claims, and that any aggression upon it might, in ordinary circumstances, be a cause of war ; yet, observing what is stated to be the law of nations in the case of ambassadors, conceiving that a rule applicable only to the case of sovereigns who are subjects, and think fit actively to exercise their rights as subjects, cannot have any extensive application, and

and is not likely to excite any general interest, or any alarm, and having regard to that which is absolutely required to maintain the relation of sovereign and subject in any country, I am of opinion that no complaint can justly or will probably arise, from any legal proceeding, the object of which is to compel, as far as practically may be, a sovereign prince residing in the territory of another prince whose subject he is, to perform the duties of a subject, in relation to his own acts done in the character of subject only.

And admitting that, in ordinary cases, it may happen, that the execution of a decree cannot be enforced against a sovereign prince though a subject of this realm, I do not think that, for that reason, a Plaintiff should be deprived of all means of establishing his right in a due course of procedure; I do not think that I ought to presume that a sovereign prince, who deems it to be consistent with his dignity and interest to come here and practically exercise the rights of an *English* subject, will not also deem it consistent with his dignity and interest to yield willing obedience to the law of *England* when duly declared.

And for these reasons I am of opinion, that His Majesty the King of *Hanover* is and ought to be exempt from all liability of being sued in the courts of this country, for any acts done by him as King of *Hanover*, or in his character of sovereign prince, but that, being a subject of the Queen, he is and ought to be liable to be sued in the courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged as such subject.

And in respect of any act done out of this realm, or any act as to which it may be doubtful, whether it ought to be attributed to the character of sovereign or to the character

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character of subject, it appears to me, that it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject.

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 And it further appears to me, that in a suit in this Court against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject.

I cannot, therefore, consider the present suit as an ordinary suit between subject and subject; it is a suit against a Defendant who is *prima facie* entitled to special immunities, and it ought to appear on the bill, that the case made by it is a case to which the special immunities ought not to be extended.

What is shewn is, that the Defendant is an *English* subject, and may therefore not be exempt from suit in some cases. Is it shewn that this is one of the cases in which the Defendant is liable to be sued?

The object of the suit is to obtain an account of property belonging to the Plaintiff, alleged to have been possessed by the Defendant, under colour of an instrument creating a species of guardianship unknown to the law of *England*. It is not pretended that any one act was done, or that any one receipt in respect of which the account is asked, was made in this country. Every act alleged as a ground of complaint was done abroad, in *Brunswick*, in *Hanover*, or elsewhere in foreign countries. No act alleged as a ground of complaint, was done by the Defendant before he became King of *Hanover*, and from the nature of the transaction, and the recitals in this instrument, there are strong grounds to presume, that it was only by reason of his being King of

of *Hanover*, that the Defendant was appointed guardian of the Plaintiff's fortune and property. It is not pretended that the instrument has been impeached, or attempted to be impeached, in the country where alone it has its locality and operation, although it is alleged to be illegal there, and no reason is given why the Plaintiff has not availed himself of that illegality to obtain relief from it.

It is alleged to be null and void here; and upon this I may observe, that although, with regard to *English* instruments, intended to operate according to *English* law, the Court, knowing the nature of the instrument, the relation between the parties to it, and the law applicable to the case, may be able, even on demurrer in a simple case, to adjudicate thereon upon a mere allegation that the instrument is null and void, yet that with regard to a foreign instrument, intending to operate according to a law not known in *England*, and which, as foreign law is to be proved as a fact in the cause, an allegation that the instrument is void is too vague. But passing that over, and considering the other matters which I have mentioned, and observing, notwithstanding the allegation at the bar that the instrument complained of is wholly independent of any political or state transaction, it is in the bill stated as the sequel to a political revolution, which resulted in the deposition of a sovereign prince and the appointment of a successor, made under the authority of a decree of the *Germanic* Diet by the late King of *Hanover* and the reigning Duke of *Brunswick*; considering also that the instrument, stated as the sequel of these political proceedings (which I must consider to be either wholly immaterial, or as introduced into the bill for the purpose of shewing the character of the transaction in question), is stated to have been executed by the late King

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King of *Hanover* and the reigning Duke of *Brunswick*; and considering further, the objects for which the instrument is purported to have been executed, connecting those objects with the political transactions stated in the bill, and the transactions alleged to have taken place at *Osterode* in 1830, I should, if it were necessary for me to decide the question, be disposed to think that the instrument complained of is connected with political and state transactions, and is itself, what in common parlance is said to be a state document, and evidence of an act of state.

But, upon this occasion, it is not necessary for me to give any opinion upon the question whether the act complained of is or is not an act of state, or upon the question, which seems to have been raised in *France*, whether the courts of a foreign country ought to take notice of such an instrument, for the purpose of enabling the guardian, under its authority, to possess the property and effects of the Plaintiff in such foreign country; it is not even necessary for me to decide the question whether, as against a subject only, this Court could have any jurisdiction to give relief in respect of acts done abroad, under such a foreign instrument as this.

The question which I have had to consider is, whether, under the circumstances of this case, and as against a sovereign prince who is a subject of the Queen, this Court has the jurisdiction which is attributed to it by this bill.

And I am of opinion, that the alleged acts and transactions of the Defendant, under colour or under the authority of the instrument in question, are not acts and transactions, in respect of which the Defendant is liable

liable to be sued in this Court, or in respect of which this Court has any jurisdiction over him.

Let this demurrer, therefore, be allowed.

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BRADSTOCK *v.* WHATLEY.

1843.
July 7.

ON the 7th of *June* the Plaintiff took exceptions to the Defendant's answer for insufficiency.

Notice of the exceptions was not served till the 8th of *June*, and such notice was intituled in a cause of *Smart v. Bradstock* instead of in *Bradstock v. Whatley*.

On the 17th of *June* an order was obtained referring the exceptions to the Master; and on the 20th the mistake in the title of the notice was discovered.

By the 24th Order of *October 1842 (a)* it is ordered, "That when any exceptions for scandal, impertinence, or insufficiency shall be taken, the solicitor of the party taking the same, or the party himself, if he acts in person, shall leave such exceptions at the Record and Writ Clerks' office to be filed; and shall, on the same day, give notice of the filing thereof to the solicitor for the adverse party, or to the adverse party himself if he acts in person."

Mr. *Pemberton Leigh*, for the Plaintiff, now moved that the Plaintiff might be at liberty to give to the Defendant a notice

(a) *Ord. Can. 216.*

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a notice of having filed exceptions to his answer in this cause on the 7th day of *June* last, and if the Defendant should not, within eight days after service of such notice, submit to answer such exceptions, then that the Plaintiff might be at liberty to obtain the usual order for a reference to the Master of this Court in rotation to look into the Plaintiff's bill, the answer of the said Defendant and the exceptions taken thereto, and see if the said answer be sufficient in the points excepted to or not.

Mr. G. Turner and Mr. Borrett, for the Defendant, contended that the Plaintiff was not entitled to be relieved from the effect of his non-compliance with the General Order, especially as the notice had been wrongly intituled. They cited *Pearse v. Gray* (a), *Salomon v. Stalman*. (b)

*The MASTER of the ROLLS* said there appeared to have been a mere slip, from which he might relieve the Plaintiff on payment of costs, but that the difficulty was as to the form of the order to be made.

(a) 4 *Beavan*, 127.

(b) 4 *Beavan*, 243.

1843.

## HOBSON v. SHERWOOD.

July 13.

**B**Y the decree, as ultimately drawn up, the Defendants were ordered to produce before the Master all books, papers, and writings in their custody or power.

On the 31st of *May* 1842, the Master ordered the Defendants to produce deeds in their possession within fourteen days, and, default having been made, he, on the 21st of *June*, certified such default.

Upon this certificate, the Court, on the 21st of *June* 1842, made the four day order, by which the Defendants were ordered to produce the deeds, within four days after personal notice on their clerk in Court, and, in default, it was ordered, that the Serjeant at Arms should bring them to the bar of the Court to answer their contempt.

The Defendants, persisting in not producing the deeds, were afterwards arrested under this order, and brought to the bar and turned over to the Queen's Prison.

Mr. *Pemberton Leigh* and Mr. *Addis* now moved that the Defendants might be discharged, on the ground of irregularity in the proceedings. They contended, first, that the four day order, being the foundation for process of contempt, ought to have been personally served on the Defendants. *De Manneville v. De Manneville (a), Rider v. Kidder*

The four day order to enforce the production of documents in the Master's office by a party to the cause, does not require personal service.

The 11th order of *August* 1841, as amended by the 6th order of *April* 1842, does not apply to a case of default by a party in producing deeds in the Master's office pursuant to the decree, in which case the Serjeant-at-Arms goes upon a disobedience of the four day order.

(a) 12 *Ves.* 203.

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v. *Kidder* (a), in which it was said "The practice in this Court that, in order to fix a person with contempt, the service must be personal, has a strong analogy to the practice in courts of common law upon attachment. The service must be personal, unless upon some very special application it is dispensed with; which may be under circumstances certainly. The reason of requiring personal service is, *non constat* that there is a contempt; that the party knows that he has neglected to do any thing he was called upon to perform."

Secondly, that the mode of process ought to have been by attachment, in the first instance, and not by Serjeant at Arms; for, by the 11th Order of *August* 1841 (b), it was ordered, "That if any party who is by an order or decree ordered to pay money or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same, according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a Serjeant at Arms, and such other process as he hath hitherto been entitled to upon a return '*non est inventus*,' by the commissioners named in a commission of rebellion, issued for non-performance of a decree or order." On the 11th of *April* 1842 this order was amended (c), and *an attachment* was substituted for the Serjeant at Arms. That the 11th amended order was therefore applicable to this case where the four day order issued in *June* 1842.

Thirdly, they contended, that the Defendants had repudiated the services of their solicitor, who had become lunatic

(a) 12 *Ves.* 202.

(c) *Ord. Can.* 198.

(b) *Ord. Can.* 166. note (a)

lunatic previous to the order in question being made, and that the Plaintiff had notice of it, and that therefore the six clerk employed by him had no authority to act afterwards for the Defendants.

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*Mr. Kindersley and Mr. Parker, contra*, were not called on by

*The Master of the Rolls*, who said: The only question is whether there has been any irregularity in the proceedings; if there has, then notwithstanding the obstinate disobedience of the Defendants in complying with the order of the Court, they are entitled to their discharge.

The Court has ordered the production of these deeds, and the Master has certified to me that he has regularly summoned the Defendants to produce them, and that they have made default. It is said that the order was irregular, because personal service was not directed; but the order is perfectly consistent with the general practice of the Court. So far back as the year 1746 the terms of the order to compel the production of documents under a decree were (a) "that the Defendants should produce before the Master all books of account, papers, and writings in their custody or power, in four days after notice thereof to their clerk in Court, or, in default thereof, that the Serjeant at Arms attending the Court should go against the Defendants, and bring them to the bar of the Court to answer their contempt;" and I believe that these are precisely the terms of the order which has ever since been made.

The General Order of *August 1841* does not apply to this case; it applies to cases where the order is made

by

(a) *Seton's Decrees*, 420.

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by the Court, and not to proceedings in the Master's office by warrant and subsequent process, under a decree.

The last point is, that the person on whom the order was served is not to be considered the clerk in Court of these Defendants; there is, however, an ordinary proceeding for changing the clerk in Court by order; no such proceeding has been adopted in this instance, and therefore the clerk in Court has not been regularly discharged.

It is then said that the Defendants had no knowledge of these proceedings; but from the affidavits it is perfectly clear that they had notice of the order made, and one of them has throughout expressed her determination not to produce these deeds.

There does not appear to be any irregularity, and I must therefore refuse this application with costs.

1842.  
Dec. 8, 9.

## PERRY v. TRUEFITT.

The ground on which the Court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other *indicia* by which he may pass off his own goods to purchasers as the manufacture of another person.

If a Plaintiff coming for an injunction in such a case appears to have been guilty of misrepresentations to the public the Court will not interfere in the first instance.

THIS was a motion for a special injunction to restrain the Defendant from selling a greasy composition for the hair, under the name of "Medicated Mexican Balm," or under similar designations.

It appeared that, in 1836, a Mr. *Leathart* invented a grease or mixture for the hair, the secret and recipe for making which he sold to the Plaintiff, a hair-dresser and perfumer residing in *Burlington Arcade*.

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The Plaintiff gave to the composition in question, the name of "Medicated *Mexican* Balm," and sold it as "*Perry's* Medicated *Mexican* Balm." It having acquired an extensive sale and repute, the Defendant *Truefitt*, (a rival hair-dresser and perfumer living in the same place,) had lately commenced selling a greasy composition, somewhat similar to that of the Plaintiff, in bottles, and with labels closely resembling those used by him. He designated and sold it as "*Truefitt's* Medicated *Mexican* Balm."

The Plaintiff thereupon filed this bill, alleging that the name or designation of Medicated *Mexican* Balm had become of great value to him as a trade mark; that its adoption by the Defendant was apt to deceive persons desirous of purchasing the Plaintiff's composition, and was very injurious to him. The bill prayed an account of the profits made by the Defendant, and for an injunction.

Though Mr. *Leathart* was the inventor, yet the Plaintiff, according to his own statement, used a printed shew card, in which he represented the article in question in the following terms:—"By special appointment—**MEDICATED MEXICAN BALM**, for restoring, nourishing, strengthening, and beautifying the hair, *Perry*, 12. and 13. *Burlington Arcade, London*. It is a highly concentrated extract from vegetable balsamic productions, of that interesting but little known country, *Mexico*, and possesses mild astringent properties, which give tone to weak and impoverished hair, and impart a glossy appearance to the naturally dull and harsh. Where there is a tendency to fall off, the *Mexican* Balm exerts its astringent qualities, and gradually, but infallibly, braces the pores of the cuticle, and arrests the deterioration of that most beautiful ornament of the

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human frame, a fine head of hair. *This admirable composition is made from an original recipe of the learned J. F. Von Blumenbach, and recently presented to the proprietor by a very near relation of that illustrious physiologist.*"

The application was supported and resisted by affidavits, in one of which, filed on the part of the Plaintiff, it was stated, that the Defendant's mixture being submitted to chemical analysis, was found to be "composed of lard and olive oil, perfumed with essential oils;" but that that of the Plaintiff "did not contain lard or any other animal fat."

It appeared also from an affidavit, that the Plaintiff had in many instances adopted the fanciful names invented for similar articles by the Defendant and other persons, he merely prefixing his own name thereto, as in the present case.

Mr. Pemberton and Mr. Trotter, in support of the motion. The Plaintiff has acquired the sole right of using the name invented by him, and of which he has had the uninterrupted enjoyment for six years. It has become a trade-mark which the Defendant has no right to assume, and which this Court will protect. In *Millington v. Fox* (a), it was held that the Court "will grant a perpetual injunction against the use, by one tradesman, of the trade-marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms."

So in the "Watch Case" (b), "the Vice-Chancellor granted an injunction to restrain the Defendant from sending

(a) 5 M. & Cr. 359.

(b) 1 Chitty's General Pract. 721.

sending to *Constantinople* certain watches with the word "*Pesendede*," in *Turkish* characters, (meaning "*warranted*,") in imitation of the watches of the Plaintiff, by which they had for very many years been distinguished, and by which he had obtained great credit in the *Turkish* trade." (a)

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(a) GOUT v. ALEPLOGLU.

V. C.  
1833.

April 15.

This case seems to have been as follows: — The Plaintiff *Gout* had been accustomed to manufacture watches for the *Turkish* market, in which country they had acquired great repute, and were known by the marks engraved thereon, as after stated. The Plaintiff had been accustomed to engrave upon the inside of his watches, and in *Turkish* characters, his name, and the word "*Pessendede*," which signifies "*warranted* or *approved*." There was also *R.G.* and a crescent put in relief, and a sprig and crescent.

Injunction to restrain a party from making and sending to *Turkey* watches having the Plaintiff's name or the word "*warranted*" engraved thereon in *Turkish* characters in imitation of the Plaintiff's watches.

In 1831 the Defendant applied to the Plaintiff to undertake an order for the manufacture of watches to be consigned to *Constantinople*, but conceiving he might injure his agent there, the Plaintiff refused to execute such order.

The Defendant afterwards got Messrs. Parkinson to manufacture watches for him, on which there were engraved, in *Turkish* characters, the words "*Ralph Gout*" and "*Pessendede*" on the same part of the watch as those of the Plaintiff, and which the Defendant *Aleploglu* consigned to *Constantinople*, and sold there to the prejudice of the Plaintiff's trade.

Mr. *Knight* and Mr. *Koe* moved for an injunction.

Mr. *Spence*, contrâ.

The Vice-Chancellor granted an injunction in the terms of the notice of motion, restraining *Aleploglu* from sending or

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We admit that when a party makes a new invention, and does not obtain the protection of a patent, any other person who can discover the process of the invention, may both make and sell the article; but what is complained of here is, that the Defendant not having discovered the ingredients of the Plaintiff's invention, sells a spurious article quite different from that manufactured by the Plaintiff under the name appropriated by the Plaintiff to his invention. He sells a composition of lard and olive oil, as the composition of the Plaintiff, which contains no animal fat. He sells an inferior article, and the trade and reputation of the Plaintiff is thereby injured. There is also evidence that the Defendant has represented the two articles as being the same, and that his own is the original. It could not be by accident that the Defendant adopted the peculiar name, his object could only have been to obtain to himself the benefit of the character and celebrity of the article invented by the Plaintiff. The prefixing his own name does not remove the objection. The Defendant is committing a fraud on the Plaintiff, and an imposition on the public. This Court ought to restrain him from fraudulently using the words, adopted by the Plaintiff to distinguish his manufacture, for the purpose of attracting custom, which, but for such improper conduct on the part of the Defendant, would have gone to the Plaintiff; *Knott v. Morgan.* (a)

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or permitting to go to Constantinople and Turkey, or to any other place, and from selling and disposing of any watches with the name of the Plaintiff thereon in Turkish characters, or the word "*Pessendedede*" thereon in Turkish characters, or any watches in imitation of the Plaintiff's watches; and also restraining *Alepoglu* and Messrs. *Parkinson* from manufacturing or vending such watches. *Reg. Lib.* 1832. A. 1247.

(a) 2 *Keen*, 215.; and see *Day v. Benning*, 1 C. P. c. 489.

Mr. G. Turner and Mr. James Parker, *contra*.

A party cannot acquire an exclusive property in a name; *Blanchard v. Hill* (a), *Canham v. Jones* (b); if there be any right, it is a legal right, which ought to be ascertained by proceedings at law, before this Court interferes by injunction. If the Plaintiff could establish such a right as that which he contends for, he would be in a better situation than a patentee after the expiration of his patent, who cannot prevent other persons availing themselves of his invention, or from selling the article by the same name.

There appears also to be a usage amongst the trade to adopt any fanciful name invented by another party, if he merely prefixes his own name; and the Plaintiff, as appears from the affidavits, has adopted that practice in several instances, to the prejudice of the Defendant.

The Defendant has never pretended to sell his own manufacture as that of the Plaintiff, but a similar article merely; this he had a right to do. In every instance he carefully prefixed his own name to the article he sold, and sold it as "*Truefitt's Medicated Mexican Balm*," and not as "*Perry's Medicated Mexican Balm*." This is not like the cases of *Sykes v. Sykes* (c), *Blofeld v. Payne* (d), where the Defendants had used the marks on the shot belts and the wrappers on the hones in order to pass off their own manufacture as the Plaintiff's; so in *Millington v. Fox*, the mark used was the name of the Plaintiffs, and naturally designated them as the manufacturers of the steel made by the Defendant.

The false statements made by the Plaintiff to the public as to the invention, is fatal to his application for

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(a) 2 *Atk.* 484.

(c) 5 *B. & Cr.* 541.

(b) 2 *Peres. & B.* 218.

(d) 4 *Barn. & Ad.* 410

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an injunction. Though the invention is stated and proved to have been made by *Leathart*, the Plaintiff has represented to the public that "this admirable composition is made from an original recipe of the learned *J. F. Von Blumenbach*, and recently presented to the proprietor by a very near relation of that illustrious physiologist." It is also represented to be "a concentrated extract from vegetable balsamic productions of *Mexico*"; but that does not in any way appear to be the case. Now, in *Pidding v. How* (a), the injunction was refused on the ground of the public misrepresentations of the Plaintiff as to the composition of a tea called "*Howqua's Mixture*." The Vice-Chancellor there says, "it is a clear rule laid down by courts of equity not to extend their protection to persons whose case is not founded in truth. And as the Plaintiff in this case has thought fit to mix up that which may be true with that which is false, in introducing the tea to the public, my opinion is, that unless he establish his title at law, the Court cannot interfere on his behalf."

*Motley v. Downman* (b) and *Morison v. Salmon* (c) were also cited.

Mr. *Pemberton*, in reply.

*The Master of the Rolls.*

The question in cases of this kind is, whether the Court should grant an injunction in the first instance, or should withhold its interference until the matter has been tried in a court of law, to which jurisdiction the determination of the legal right properly belongs.

I think

(a) 8 *Sim.* 477.

(c) 2 *Man. & G.* 385.

(b) 3 *Myl. & Cr.* 1. And see  
*Singlerton v. Bolton*, 5 *Doug.* 293.

I think that the principle on which both the courts of law and of equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man ; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark ; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark.

The case of *Millington v. Fox* (a) seems to have gone this length, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. I am not aware that any previous case carried the principle to that extent.

In the present case the material facts do not appear to me to be in dispute. Some years ago the Plaintiff, Mr. *Perry*, became possessed of a recipe which he calls the secret for making a certain composition to encourage the growth of hair. To that composition he has given the name of "*Perry's Medicated Mexican Balm*." He says that

(a) 3 *M. & Cr.* 338.

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A man cannot acquire a property merely in a name or mark.

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that the term "Medicated *Mexican Balm*," to which he has prefixed his name, has acquired a character and reputation in commerce, by which his particular composition is distinguished, and that whenever the particular name of "Medicated *Mexican Balm*" has been used, it has been understood to mean the Medicated *Mexican Balm* of Mr. *Perry*, of which he has the sole secret. He says also, that nobody could well suppose there was any such composition other than that to which his name was attached. It certainly is not very easy to see how that could be so, because all the words that are used in the phrase "Medicated *Mexican Balm*," are perfectly capable of being applied to a very different composition. It may be a *balm*, but not his *balm*; it may be *medicated*, but not medicated in his way; it may be *Mexican*, and yet not *Mexican* of the same sort or material as that which he uses. It is therefore difficult to suppose there could not be any other "Medicated *Mexican Balm*" than that to which the Plaintiff has given the name of "*Perry's Medicated Mexican Balm*." However, there is evidence, and evidence of considerable strength and importance to that effect, which is not denied.

The Plaintiff having sold this composition for several years, and derived considerable profit therefrom, the Defendant, Mr. *Truefitt*, a very few months ago, set up as a manufacturer of "Medicated *Mexican Balm*." He is not, however, and does not pretend to be, the manufacturer or vendor of *Perry's Medicated Mexican Balm*, but the article which he makes and sells is by him designated as "*Truefitt's Medicated Mexican Balm*."

It is in no way denied that he has adopted the term "Medicated *Mexican Balm*" from the Plaintiff, or that he intended to derive some benefit from adopting the name, which, to the extent I have referred to, belonged to

to the Plaintiff; but he says, there is, in the trade of perfumers to which he belongs, a general custom, that if any man invents a fanciful name for any article which he manufactures and sells for the toilette, he never thinks, nor do the trade think that he has a property in that name, and that any other manufacturer has a right to adopt the same name, provided he only prefixes his own name to it as the manufacturer of the article so named. I should be very much surprised if it could be established that there was a custom of trade by which one man's property or rights could be transferred from him to another. In such a case as this, if Mr. *Perry* alone had the peculiar right to this name, I should be surprised to find any custom of trade by which his right could be infringed upon: that however is the ground on which Mr. *Truefitt* says he acted; he says, "I have sold this in my own name."

There is, however, an imputation, that Mr. *Truefitt* sold his composition, alleging it to be the manufacture of Mr. *Perry*. I believe, from the evidence, he intended cautiously to guard against this: he seems to have thought that by prefixing the name of *Truefitt* to every article he sold, he prevented any imputation on him that he was selling *Perry's* article, and the care taken in that respect is remarkable. Even in the cases where the bottles of *Perry* were taken to be filled or *refilled*, as the witnesses state, Mr. *Truefitt* never allowed the bottles to go out of the shop with the name of "Perry" on them, or otherwise than with his own name of "Truefitt" attached to them.

The question is, whether in a case where there has not been, on the part of the Defendant, an intention to sell the article as the article manufactured by the Plaintiff, there is enough to induce the Court to grant the injunction? I think it is as the Plaintiff's

counsel

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counsel stated, *Truefit* is not accused of having sold the article which *Perry* manufactured, but of selling another article of a different kind, as and for the article of Mr. *Perry*, distinguishing it by the name of " *Truefiti's* Medicated Mexican Balm" and without attaching the name of *Perry* to it, and that seems to be the point on which this case turns. Now it is a legal question to be determined at law, whether Mr. *Truefit* had a right to do so or not; and I think, if the case rested on the merits alone, I should say that this motion ought to stand over, in order that an action might be brought to try the right; but when we see the representations made by Mr. *Perry*, I think they are conclusive against him on this application.

I entirely agree with the observation made by the Vice-Chancellor of *England*, in the case of *Piddig v. How* (a) relative to *Howqua's* mixture of tea; I do not think it is a favourable case for the interposition of this Court, to say the least of it, when a party, having bought a secret invented by a Mr. *Leathart*, represents to his customers and the world, that his " admirable composition is made from an original recipe of the learned *Von Blumenbach*, and was recently presented to the proprietor by a very near relation of that illustrious physiologist."

The Plaintiff states also a circumstance, not in the least degree supported by evidence, that the composition is formed of vegetable balsamic production from *Mexico*. There are other things, which I do not think it necessary to observe upon, which make me think this is not a favourable case for a person to come in the first instance and claim the assistance of a court of equity, in aid of a legal right, which however I do not deny he may have.

I think

(a) 8 *Sim.* 477.

I think this case must stand over with liberty to Mr. *Perry* to bring an action, and either party must have liberty to apply.

**NOTE.**—The Plaintiff having taken no steps to try the action, the Defendant, on the 5th day of July 1843, applied for the costs of the motion, which were granted. The bill was then (with the consent of the Plaintiff) dismissed with costs.

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### STRICKLAND v. STRICKLAND.

THIS case was argued by

Mr. *Pemberton*, Mr. *Bethell*, and Mr. *Heathfield*, for the Plaintiff.

Mr. *Kindersley* and Mr. *Shadwell*, for the principal Defendant.

Mr. *Turner* and Mr. *Koe*, for other parties.

April 22, 23.  
25, 27, 28, 29.  
August 4.

In cases where there are outstanding terms, which may be set up in defence to the action, and prevent a trial of the real merits of the case, or where the facts are such, and of a nature so complicated that complete and effectual relief can only be given in equity, this Court will afford its assistance, and will, if the circumstances

4.

#### *The MASTER of the ROLLS.*

This bill prays, that the will and codicil of Sir *George Strickland*, who died in 1808, may be established, and the trusts thereof carried into execution under the decree of this Court: and that it may be declared, that the Plaintiff, on the death of *Walter Strickland*, became

entitled, and will, if the circumstances

require it, first see that the legal requisites to the Plaintiff's title are established, and then give the necessary relief; but this must be upon a bill framed for the purpose, stating the difficulties, and praying the assistance of the Court to remove them. The cases of dower and partition are, however, exceptions to the rule.

Where a party sought in this Court to recover a real estate on the ground of his interest being equitable, but did not ask relief against any impediment to a trial at law, and it turned out at the hearing that his title was a legal title, the Court refused to retain the suit to enable the Plaintiff to establish his right at law by an action or issue, and dismissed the bill.

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entitled, for his life, to all the estates (including the estates at *Winteringham, East Haslerton, and Knapton*), which are expressed by the will to be devised to *George Strickland, Charles Strickland, and Walter Strickland* respectively, but exclusively of the estates by the will devised to *Charles Strickland*, immediately or expectant on the death of Dame *Elizabeth Letitia Strickland*; and that the Defendant Sir *George Strickland* may be decreed to convey the same to the Plaintiff, accordingly, and to account to the Plaintiff for the rents and profits thereof, received by him since the death of *Walter Strickland*, after deducting all payments made in respect of charges created by the will, and also to deliver to the Plaintiff the deeds and evidences of title of and relating to the same estates respectively; and that, in the mean time, a Receiver may be appointed of the same estates; and that it may be declared that the Plaintiff is entitled to cut down any timber, or to open and work any mines upon the estates to which he so became entitled for life; and that it may be declared that, under the circumstances in the bill mentioned, the Defendant Sir *George Strickland* is bound to settle and convey all the estates, lands, and hereditaments, in which the testator had any estate or interest (other than the estates which passed by his will), of or to which the Defendant Sir *George Strickland* became seised, or possessed, or entitled, under or by virtue of any will or settlement made previous to the date of the will of the testator Sir *George Strickland*, either directly or through Sir *William Strickland*, in such manner, that upon failure of issue male of Sir *William*, the same might remain to the other sons of the testator and their issue male (including the Plaintiff and his issue male) in succession, and on failure of such issue, in the same manner as the testator has, by his will, limited the rest of his estates in failure of issue male from him.

Upon

Upon the hearing of this cause, it appeared to me that the title of the Plaintiff depended entirely upon the legal validity and effect of the will and codicil of the testator, and that he could not be entitled to any relief in this Court, until he had first established the validity of the devises by a proceeding at law.

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v.
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It was then contended on the part of the Defendant Sir *George Strickland*, that the Plaintiff was not entitled to any relief whatever in this Court, and that, at all events, all proceedings in the cause should be suspended, till the Plaintiff had made out his title in an action; whilst, on the other hand, the Plaintiff contended, that his title to the estates in question was an equitable title: — that the circumstances of the case entitled him to relief here: — and that, if it were necessary for him to establish the validity of the devises at law, it would be more convenient to do so on the trial of an issue, than on the trial of an action.

The question is, whether the bill is to be retained, and if so, whether it shall be retained for a year, with liberty for the Plaintiff to bring an action, or whether an order should be made for the trial of an issue.

Upon the facts which are in issue and proved in this case, I am of opinion, that the Plaintiff's title, such as it is, is a legal title, a title which may be made available at law in the ordinary course of legal proceeding, unless there be some obstacle, making it necessary and proper to ask for the assistance of this Court, and the bill be so framed as to entitle the Plaintiff to that assistance.

In cases where there are outstanding terms, which may be set up in defence to the action, and prevent a trial

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trial of the real merits of the case, or where the facts are such, and of a nature so complicated, that complete and effectual relief can only be given here, this Court will afford its assistance, and will, if circumstances require it, first see that the legal requisites to the Plaintiff's title are established, and then give the necessary relief; but this must be upon a bill framed for the purpose, stating the difficulties, and praying the assistance of the Court to remove them.

This is not the case in this suit. The bill states the Plaintiff's title, and that notwithstanding the devise under which he is entitled, the Defendant Sir *George Strickland* has taken, and holds possession of the estates in question, claims a right to receive the rents and apply them to his own use, and has possessed himself of the deeds. The bill does not allege, that the deeds are wanting to enable the Plaintiff to make out his title at law, or the seisin of the testator under whom he claims; but stating that the Defendant Sir *George Strickland* has refused to comply with the Plaintiff's request to give up possession of the estates and of the deeds, and to account for the rents, the bill proceeds to charge several circumstances, from which it is meant to be deduced, that the devise under which the Plaintiff claims, is to be deemed a valid devise; and, in effect, the Plaintiff seeks to recover possession of the estate, in this cause, by the strength of his own title here, not asking the assistance of this Court to relieve him from difficulties, which he may be unable to overcome at law without the aid of this Court.

It was argued, that if difficulties are shewn to exist, and if, from the nature of the case, it appears to be in the power of the Defendant to raise those difficulties, this Court will not only restrain the Defendant from raising

raising the difficulties, but will assume the whole jurisdiction over the case; and if this were so, the Plaintiff might be entitled to relief on this bill. But there is no such general rule; there are, indeed, some particular cases of legal right, such as dower and partition, in which the Court has assumed a general jurisdiction, probably in consequence of the difficulties to which the Plaintiff would be subjected in seeking to obtain complete justice at law; but in other cases, the Plaintiff is to shew what the difficulties are, and how they impede him in a manner contrary to equity, and his bill ought to pray to be relieved from them.

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In this case the bill does not contemplate any proceeding at law;—it asks for no assistance in any trial, neither by the production of any deeds, nor by injunction from setting up outstanding terms, nor in any other way; and I am of opinion, that as the Plaintiff has not shewn an equitable title — as it appears that the title by which he claims is a legal title — as he asks relief in this Court on the foundation of the equitable title which he alleges but has not shewn, and does not ask for the assistance of this Court in aid of any proceeding at law to recover upon a legal title, he is not, upon this bill, entitled to any relief here, and that therefore the bill must be dismissed.

Generally, in such a case the bill should be dismissed with costs; but having read the plea and the answer of Sir *George Strickland* to the original bill, and his plea and answer to the amended bill, and observing the mode in which his defence has been conducted in the pleadings and the allegations made in the answers, I think that, as against Sir *George Strickland*, the bill must be dismissed without costs. The other Defendants are entitled to their costs.

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 v.  
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The cross bill of Sir *George Strickland* must be dismissed without costs.

1843.  
*Feb. 23.*

BARKER *v.* COCKS.

A testator, gave a fund, subject to the life interest of his wife, to *A., B., and C.*, equally to be divided between them, "but in case of the decease of *C.* without leaving lawful issue," he gave her one third between *A.* and *B.* Held, that upon the decease of the wife, *C.*, who was then living, became absolutely entitled to one third of the fund.

UPON the marriage of *James Nicoll Morris* and *Margaretta Sarah Cocks* a settlement was made, whereby a sum of 17,000*l.* 3 per cent. Imperial Annuities were settled on the husband for life, with remainder to the wife for life, with remainder to the issue, and, in default, as the husband should appoint.

There was no child of the marriage.

*James Nicoll Morris*, by his will dated in 1823, amongst other things, expressed himself as follows:— "And as to the sum of 17,000*l.* 3 per cent. Imperial Annuities now subject to the trusts of my marriage settlement, and any monies which I may die possessed of in the Bank stock of this kingdom, I do hereby give and bequeath the same, from and after the decease of my said wife, unto my cousins *John Bowden Morris* and *Margaret Penelope Morris* and my sister-in-law *Eliza Jane Cocks*, equally to be divided between them, share and share alike; but in case of the decease of my said sister-in-law *Eliza Jane Cocks*, without leaving lawful issue, I do hereby give and bequeath her third part of the said stocks, funds, and securities equally between my said two cousins *John Bowden Morris* and *Margaret Penelope Morris*, and to their respective executors and administrators."

The

The testator died in 1830. His widow, *Margareta Sarah Morris*, died in *February 1842*.

By this bill, *Eliza Jane Cocks* (now *Eliza Jane Barker*) claimed to have one third of the fund paid over to her.

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BARKER  
v.  
COCKS.

Mr. *Plunkett* and Mr. *Wickens*, for the Plaintiffs, cited *Home v. Pillans* (a), *Galland v. Leonard* (b), *Monteith v. Nicholson* (c), *Griffiths v. Smith* (d), *Bell v. Phyn* (e), and see *Davenport v. Bishopp*. (g)

Mr. *Glasse*, for *J. B. Morris* and *M. P. Morris*; *Tilson v. Jones* (h), *Smart v. Clark.* (i)

Mr. *Bates*, for the trustee.

*The MASTER of the ROLLS.*

I think that the Plaintiffs are entitled. The first object of the testator was that the three legatees should enjoy the property, share and share alike; each was to have an equal advantage with the others; but as to the one third part of *Eliza Jane Cocks*, there is a gift over to the other two in case of her decease without leaving lawful issue. The question is, to what period of time does this event relate. If you make the dying without leaving lawful issue refer to the period anterior to the death of the tenant for life, you carry into effect the primary intention of the testator to divide the fund amongst the three, share and share alike.

|                                |                                         |
|--------------------------------|-----------------------------------------|
| (a) 2 <i>Myl. &amp; K.</i> 15. | (c) 7 <i>Ves.</i> 452.                  |
| (b) 1 <i>Swan</i> , 161.       | (g) 2 <i>Y. &amp; Col. (C. C.)</i> 463. |
| (c) 2 <i>Keen</i> , 719.       | (h) 1 <i>R. &amp; M.</i> 553            |
| (d) 1 <i>Ves.</i> jun. 97.     | (i) 3 <i>Russ.</i> 365.                 |

1842.

August 1.

## BONSER v. COX.

A creditor against two estates for the same debt, is entitled to receive dividends on the full amount from both estates, until he has been satisfied his debt.

**T**HE MASTER of the ROLLS.

This suit was instituted for the administration of the estate of *John Cox* deceased, for the benefit of his creditors.

Sir *Joseph Lock*, who had been partner with *Thomas Richard Walker*, was a creditor of *John Cox* to the amount of 3200*l.*, for the payment of which he claimed a lien on a sum of 2982*l.* stock, standing in the name of the Accountant-General of this Court, to the account of the testator's leasehold estate.

He had also a claim on a bill of exchange to which *John Cox* and others were parties.

And he had a collateral security from *Ferdinando Cox* and his wife, who transferred 30*l.* Long Annuities into the names of *Lock* and *Walker*, as a guarantee for any loss which they might incur in and about the transactions with *John Cox*.

Sir *Joseph Lock* established his lien on the fund in this Court. The fund was ordered to be sold, and the money to be applied in reduction of the debt; and it was ordered, that Sir *Joseph Lock* should stand as a creditor on the general assets of *John Cox* for the balance and for his costs. The balance and costs having been ascertained, Sir *Joseph Lock* was, under the order, admitted a creditor for 459*l.* 19*s.* 4*d.*

Since

Since his being admitted creditor for this sum, he has sold the Long Annuities assigned to him as a guarantee, and incurred some costs on account thereof; and he has received, as a dividend on the estate of a bankrupt who was party to the bill of exchange on which *John Cox* was liable, the sum of 22*l.* 12*s.*

1842.  
BONSER  
v.  
Cox.

This petition prays that the money received in respect of the Long Annuities may be first applied in payment of any costs which *Sir Joseph Lock* may be entitled to have paid thereout; and that the residue thereof, together with the sum of 22*l.* 12*s.*, may be applied in satisfaction or reduction of the 459*l.* 19*s.* 4*d.*, for which he has been admitted a creditor against the estate of *John Cox*.

I am of opinion that the petitioner is not entitled to this relief. The 30*l.* Long Annuities were a collateral security, and the produce is to be applied in payment of what *Sir Joseph Lock* shall lose in respect of the transactions in question and certain costs. It is not to be applied in exoneration of the estate of *John Cox*. Whatever may be received by *Sir Joseph Lock*, and applied otherwise than according to the guarantee, he will be answerable for to *Ferdinando Cox* and wife, or those claiming under them.

And as to the 22*l.* 12*s.*, if it be obtained, as was stated at the bar, from the estate of a person who was party to a bill of exchange to which *John Cox* was also a party, *Sir Joseph Lock* is entitled to payment of dividends out of both estates till his whole debt is satisfied; he is not to receive more than one satisfaction; but, until he is satisfied, he may stand as a creditor against the estate of *John Cox*, and also against the estate of *Richard William Johnson*, and receive dividends from both.

Dismiss the petition with costs. (a)

(a) See *Ex parte Wildman*, 1 *Atk.* 109., and *In re Plummer*, 1 *Phillips*, 56.

1848.

March 1, 2.

CHOLMONDELEY *v.* Lord ASHBURTON.

A widow, as such, cannot take under a limitation to the next of kin of her husband according to the statute of distributions.

In a marriage settlement, the ultimate limitation of a fund was to such persons "as would, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the statute for the distribution of personal estate of persons dying intestate, if the husband had died intestate without having been married to *A.*" his wife. The wife died, and the husband married again and died: Held, that his widow took nothing under this limitation.

UPON the marriage of *George James Cholmondeley* with *Catherine Francis*, his second wife, a sum of 10,000*l.* belonging to the former was settled upon the husband, wife, and the children of the marriage; and in case of there being no children (which happened) the fund was to be held on the trust following:—"In trust for such person or persons as would, at the decease of the said *George James Cholmondeley*, be entitled to his personal estate, as *his next of kin according to the statutes for the distribution of personal estate of persons dying intestate*, if the said *George James Cholmondeley* had died intestate without having been married to the said *Catherine Francis*."

There were no children of the marriage. *George James Cholmondeley* survived *Catherine* his wife, and contracted a third marriage with the Defendant *Mary Elizabeth Townsend* (now Countess of *Romney*). He died in 1830, leaving two children his next of kin, viz. the Plaintiff, the only surviving issue of his first marriage, and the Defendant *Frances Sophia Cholmondeley*, the only issue of his third marriage.

The question in the cause was, whether, under the ultimate limitation, the widow of *George James Cholmondeley* was entitled to participate in the 10,000*l.*, or whether it belonged exclusively to his children, as his sole next of kin.

Mr. *Pemberton* and Mr. *Tripp* for the Plaintiff; and  
Mr.

Mr. Kindersley and Sir Walter Riddell, in the same interest, contended that the wife was not of the blood or kindred of her husband, and could not therefore take under a limitation to his next of kin.

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CHOLMON-
DELEY
v.
Lord
ASHBURTON.

They cited *Withy v. Mangles* (a), *Watt v. Watt* (b), *Garrick v. Lord Camden* (c), *Elmsley v. Young*. (d) 21 *Hen. 8. c. 5. s. 3.*, and 22 & 23 *Car. 2. c. 10.*

Mr. Turner and Mr. Stinton, contra, argued that the widow of the third marriage was entitled to share in the fund. They cited *Hardwick v. Thurston* (e), *Bailey v. Wright*. (g)

Mr. Williams for an executor.

The MASTER of the ROLLS.

Cases of this kind are never quite satisfactory, in consequence of the popular meaning which in common parlance is attached to the words "next of kin according to the statute."

If the words "next of kin" had been omitted, I should have no doubt that the widow would be then entitled; but, having been inserted, I must give them full legal effect, and look for the persons whom the law designates by that expression. I find that the wife is not one of the next of kin. The whole is given amongst the next of kin, and the two children are therefore entitled if it be the fact that there were no children of the second marriage, and no appointment. Those facts must be ascertained.

(a) 4 *Beavan*, 358.
(b) 3 *Ves.* 244.
(c) 14 *Ves.* 372.

(d) 2 *Myl. & Keen*, 82. 780.
(e) 4 *Russ.* 580.
(g) 18 *Ves.* 49.

1843.

March 15, 16.

Where a Plaintiff, by his bill, seeks a discovery of matters which might subject the Defendant to a criminal prosecution, and also seeks other legitimate discovery, it is his duty to separate the two; for if they be so mixed up or connected, that either by inference or exclusion they may lead to a disclosure which might subject the Defendant to prosecution, he is not bound to answer any portion of it.

THE bill in this cause prayed the delivery up of two bills of exchange, alleged to have been given for gambling, and for an injunction to restrain an action at law brought by the Defendant thereon.

The bill was filed in November 1842, and stated, "that the Defendant *Joseph Bond* of No. 54., *St. James's Street*, in the county of *Middlesex*, for some time previously to and on the 26th day of *July 1841*, kept a gambling-house for playing at illegal games of chance and hazard at No. 54. *St. James's Street* aforesaid."

That the Plaintiff lost 800l. "at play and gambling in such illegal games of chance and hazard, at the said gambling-house;" that "in consideration of the money so lost, and of money alleged to have been lent to him for payment of such losses," the Plaintiff accepted and delivered to the Defendant the bills in question; and that the Defendant had commenced an action at law against the Plaintiff on such bills of exchange.

The bill further stated, that the Defendant pretended that the bills had been given for good and valuable consideration, whereas the Plaintiff charged the contrary; and it charged that the Defendant "ought, by his answer, to set forth in particular what consideration, and whether in money or money's worth, and if in money, in what bills, notes, or other form, stating the dates, numbers, amounts, and particulars, of all such bills, notes, or other orders or securities for money; and if in money's worth, stating in particular the property,

erty, articles, and things, with their respective descriptions, values, and amounts, and from whom obtained by him, he gave for the said bills respectively, and to whom, and on what day, and time of the day, and in what places, and in whose house, and in whose presence respectively, stating the names, places of residence, and description of every person there present when he gave such consideration." It charged, that if the said *Joseph Bond* gave any consideration for the bills or either of them, it was but a nominal and inadequate consideration, and given colourably; and that if any considerable amount was paid, it or the greater or some part thereof was paid back again, or in some manner returned, satisfied, accounted for, or secured, or an equivalent or nearly an equivalent therefore was returned to *Joseph Bond*, or some person or persons connected with him, or the same was lent for, and applied with the knowledge of *Joseph Bond*, in payment of losses by gambling, and for the purpose of unlawful gambling; and that no portion thereof was advanced, or in any manner applied for the lawful purposes of the Plaintiff.

That the Defendant was not in the habit of receiving bills of exchange in his trade, and that he ought to set forth what was and is the course and nature of his business and transactions, but that he was engaged in bill transactions for the accommodation of persons gambling and playing at games at hazard and chance, and in bills, notes, and securities for money lost and won at play, and for money lent or advanced for payment of money lost at play, and to be used for gambling, and other such purposes. The bill also charged, that the Defendant kept books in which were entries relating to the winnings and losses in his house.

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v.
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These

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These and other similar statements and charges were interrogated in the usual manner, and the Defendant was required to answer them.

The Defendant, by his answer, merely stated that the Plaintiff had accepted the bills in question, and delivered them to the Defendant, who had commenced an action thereon; and with the exception of the bills and the proceedings in the action, he denied the possession of any documents "in the bill mentioned, and in his answer answered unto;" and "without admitting the truth of any of such matters, he declined to answer any of the other matters in the said bill mentioned, and inquired after and not thereinbefore answered unto, the Plaintiff, as the Defendant was advised and submitted and humbly insisted, not being entitled to any answer thereto from the Defendant."

The Defendant having wholly omitted to answer the other parts of the bill, the Plaintiff took twenty-two exceptions for insufficiency, which the Master however disallowed; and the cause now came on upon exceptions taken by the Plaintiff to the Master's report.

Mr. *Pemberton* and Mr. *Willcock*, for the Plaintiff, in support of the exceptions.

It is clearly settled that this Court has jurisdiction to order securities given for money lost at play to be delivered up; *Rawden v. Shadwell* (a), *Wynne v. Callander* (b); and it has the power of compelling a discovery necessary for proving the Plaintiff's case; *Andrews v. Berry*. (c)

The

(a) *Ambler*, 269

(c) *5 Anstruther*, 634.

(b) *1 Russ.* 293.

The reason the Defendant objects to answer is, because he may be subject to penalties, but where the time limited for suing for the penalties has expired, a Defendant is bound to answer, and can no longer claim any protection; *Parkhurst v. Lowten* (a), *The Corporation of Trinity House v. Burge.* (b) In this case the time has expired, 31 *Eliz. c. 5. s. 5.*

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BOND.

The Statute of *Ann* (c) enacts, that persons liable to be sued shall be compellable to answer on oath, and this act has been extended by the act of *George the Second* (d), which enables a party to have relief as well as discovery in equity.

The statement of the Defendant's keeping a gaming-house is merely descriptive, and forms no part of the equity relied upon as the foundation for the relief claimed by the Plaintiff. The principal part of the matter which is unanswered has no relation whatever to that fact. The Defendant is bound to set forth the consideration given for the bills, &c.

Lastly, the objection to answer is not properly taken. The Defendant does not state that the discovery will render him liable to any penalty.

Mr. G. Turner and Mr. Toller, *contrâ.*

The keeping of a gaming-house is an offence at common law, for which the Defendant might be indicted, *The King v. Rogier.* (e) The answer of the Defendant to these interrogatories, would all tend to lead a jury to the conclusion that the Defendant was guilty of that offence.

(a) 1 *Mer.* 400.

(d) 18 *G. 2. c. 34.*

(b) 2 *Simp.* 411.

(e) 1 *Bar. & C.* 272.

(c) 9 *Ann. c. 14. s. 3.*

1843.
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offence. Where an answer would render, or tend to render a party liable upon a criminal matter, he is not bound to answer the facts, or any link in the chain of proof; *Paxton v. Douglas* (a), *Macallum v. Turton* (b), *Southall v. ——* (c), *Glynn v. Houston* (d), *The Earl of Suffolk v. Green*. (e)

This is not a proceeding under the statute of *Ann*, brought within the three months, and that statute does not relieve the Defendant from the penalties attached to the common law offence for keeping a gaming-house.

If any of the interrogatories, taken alone, might be safely answered; yet in this case they are so connected with the imputed offence, that it would be impossible to answer them with safety. They exhaust all lawful consideration for the bill, and leave, by inference, that connected with the gaming-house. It was the duty of the Plaintiff so to have framed his pleadings as to keep the two separate.

Mr. Pemberton, in reply.

The Master of the Rolls.

Having regard to the particular relief sought, and disregarding some of the objectionable allegations contained in the bill, it appears to me, that several of the questions comprised in the interrogating part are such as the Defendant might lawfully be required to answer, but that is not the question here. The question to be determined is, whether, upon this bill, framed as it is, and

(a) 16 <i>Ves.</i> 239., and 19 <i>Ves.</i>	(c) <i>Younge</i> , 308.
225.	(d) 1 <i>Keen</i> , 329.
(b) 2 <i>Y. & J.</i> 183.	(e) 1 <i>Atk.</i> 450.

and containing the allegations which it does contain, the Defendant is bound to answer all or any of these questions.

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I cannot conjecture what reason induced the Plaintiff to insert some of the allegations contained in this record. The fact that the Defendant kept a gambling-house at No. 54. *St. James's Street*, is certainly not the foundation for the relief prayed, yet the first thing positively stated in the bill is, that this Defendant for some time previously to, and on the 26th of *July 1841*, kept a gambling-house for playing at illegal games, at No. 54. *St. James's Street*. This is not a mere description of the Defendant's house, or of where he is to be found, but a distinct and positive allegation, that at the time stated the Defendant kept a gambling-house for playing at illegal games. This undoubtedly is an indictable offence, and is one most pernicious to society. There is scarcely any offence which leads to greater mischief, yet by this bill the Defendant is charged with having committed it. The next allegation in the bill is, that the Plaintiff lost 800*l.* by playing and gambling at such illegal games at the said gambling-house, and these bills of exchange are then connected with the illegal transactions which took place at this house. The bill goes on to charge a great variety of circumstances relating to the bills, which are calculated to obtain from the Defendant the discovery, either that this was a gambling-house kept by the Defendant, or to exhaust all other means by which the Defendant might have obtained the bills, and all other valid considerations for them, and so leave the necessary inference (every thing else being excluded), that this was a gambling transaction, and as the Plaintiff says, committed at this house.

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It is perfectly true, as has been argued that this, in reality, is not the foundation for the relief. It is impossible to conjecture why it was inserted; but there is the statement standing upon this record in connection with a great variety of others, and a discovery required of these matters which more or less directly tend to shew that this was a gambling transaction committed in this very gambling-house. Now I cannot help thinking, that in a case of this sort there may be just and legitimate grounds for seeking relief and discovery and yet there are circumstances in respect of which discovery ought not to be sought, and which the Defendant is not bound to give.

It is the duty of the Plaintiff in framing his record, and in asking for discovery, to separate the matters to which he is entitled to an answer, from those which he cannot legally call upon the Defendant to discover. My attention has not specifically been called to all the interrogatories, and pending an argument, it is impossible to read them through with that attention which a case of this kind requires; but my impression is, that the subjects in respect of which discovery might have been legitimately asked for, and which the Defendant was bound to give, are more or less mixed up with interrogatories and questions, which the Defendant is not bound to answer, for if answered, they might lead to discovery tending to subject him to prosecution for penalties. I think that this ought not to have been done. If upon looking at the interrogatories, and the statements on which they are founded, I find interrogatories quite distinct and independent from the criminal matter, it may be right to call upon the Defendant to answer them; but if they are not distinct and independent, which I think is the case with regard to those to which my attention has been particularly called,

called, but are mixed up with other matters, or so connected with them, either by way of inference, or by way of exclusion, that they might lead to a disclosure of circumstances which would subject this Defendant to be prosecuted for the offence with which he is charged, then I think the doctrine of this Court would induce me to say that these exceptions to the Master's report must be overruled.

I will look over the bill. If I find any interrogatories distinct and unconnected with the criminal matter, I will mention it to-morrow; if not, the exceptions to the Master's report will be overruled.

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*The Master of the Rolls.*

*March 16.*

I have read over the bill in this case, and I find that the charge of the offence is more intimately connected with all the discovery sought, than I collected during the argument. The exceptions must, therefore, be overruled. (a)

(a) See *Lee v. Read*, 5 *Beavan*, 381., and *The Attorney-General v. Lucas*, 2 *Hare*, 566.

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Dec. 22.

## COTTON v. COTTON.

At the instance of the mortgagee of the reversion, the Court declined making a stop order on deeds brought into the Master's office under a decree.

THIS was a petition for the common stop order on funds in Court, and that the deeds might not be delivered out of the Master's office without notice to the Petitioner.

Under a will, *A. M. Cotton* was entitled to the rents of the property *durante viduitate*, and under the decree in this cause requiring the production of all deeds &c. before the Master, the deeds in question had been produced under a warrant of the Master.

The Petitioner was a mortgagee of the reversion of the fund and of the estate, and the only question was, as to his right to a stop order on the *deeds*.

Mr. *Stratton* argued, that as the deeds had been brought into Court "for the avoiding of all perils, and the indifferent custody of them," *Dixies v. Hillary* (a), the incumbrancer on the reversion was entitled to have them secured for his benefit, or at least to an order that they should not be parted with without notice to him.

The MASTER of the ROLLS said, that the deeds had been brought into Court under the decree, and merely for the purposes of the suit. That it would produce great complication to make such an order, and that as there seemed no authority for it, he must decline making one.

(a) *Cary*, 26.

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## CALVERT v. GODFREY.

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Dec. 23.1843.  
Jan. 12, 13, 14.  
March 15.

The Court has no authority to sell the real estate of an infant, or to convert it, upon the notion that it would be beneficial.

Where property is sold under a decree, and there is jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale, or prevent a good title from being made under the decree.

A purchaser under a decree, to whom a good title could not be made, dis-

**I**N this case, Miss *Watson*, the purchaser of a copyhold estate under the decree of the Court, by petition, prayed to be discharged from her purchase, on the ground that there was no jurisdiction to order the estate to be sold, and of certain alleged defects of title.

The estate belonged to Mr. *Charles Calvert*, who died intestate in the month of *September 1832*. At the time of his death, he was a trader subject to the bankrupt laws, and was entitled to certain freehold and copyhold estates, and to a large personal estate.

He was also largely indebted, and was liable to the performance of covenants, the performance of which might, after his death, have been enforced as against his copyhold estates.

For the purpose of this application, and under the circumstances, the Court thought that it ought to assume that the intestate's freehold, copyhold, and personal estates were, in the aggregate, insufficient for the payment

charged from his purchase, with his costs, charges, and expences, including the costs of his petition to be discharged.

A trader who had freehold, copyhold, and personal estate, died in *September 1832*, leaving an infant heir. His estate was insufficient to pay his debts and charges. His partners, however, by deed, took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, and the Master found that it would be for the benefit of the infant heir, that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 1 W. 4. c. 60. Held, that a sale under the decree could not be enforced; that the Court had no jurisdiction to order the sale; that the infant was not a trustee within the act; that the purchaser was not bound to wait till the error was corrected, and the Court therefore discharged him with his costs, charges, and expences.

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payment of all his debts and liabilities, and consequently, that if the estate had been administered under the strict rules of law and equity, the whole would have been sold and disposed of, the debts and liabilities would have been but in part satisfied, and nothing would have been left for the intestate's heirs and next of kin, and that this would have been the result of a regular proceeding to sell and marshal the assets for payment, as far as they would extend, of all the debts and liabilities.

In this state of things, and soon after the intestate's death, his surviving partners proposed an arrangement for the full payment of all his debts, and for securing a provision for his family, and for the purpose of carrying this arrangement into effect, a deed, dated the 15th day of *May* 1838, was executed.

By this deed, after reciting that the whole real and personal estate would fall very short of answering the debts and liabilities, it was further recited, that the surviving partners, out of regard to the memory of the intestate, and the interest of his family, proposed, that such measures should be taken, that the whole of the real and personal property (exclusive of his share in the partnership effects and property, and exclusive of a life estate which belonged to his widow), should be secured and applied for the benefit of his family, and that the whole of his debts should be paid in full out of the capital and property of the partnership, or by the surviving partners; and after further reciting, that the freehold estates were liable to the payment of the simple contract, as well as the specialty debts, and that by marshalling the assets, the copyhold estates might be applied towards satisfaction of an annuity of 1700*l.*, which the intestate had covenanted to pay to his widow; and that such provision as therein mentioned was made for payment of all the

the debts, it was agreed, that the freehold, copyhold, and personal estate of the intestate (with such exception as therein mentioned), so far as by law might be done, should be sold under the direction of a Court of Equity, and that the money to arise from the sale should be invested in the purchase of stock, and the dividends applied towards payment of the annuity, according to the intestate's covenant; and that after the widow's death, the capital should be divided equally among the children. The surviving partners were to apply the amount of the intestate's interest in the partnership assets, as far as it would extend, in satisfaction of all his debts, and they engaged, personally, to pay all the debts which could not be so satisfied; and they further engaged, personally, to satisfy so much of the widow's annuity as the other means contemplated by the deed were insufficient to pay, and that, whether the estates could be sold or not; and they also, by way of free gift, made a further provision of 12,000*l.* for the children; and it was arranged, that a suit in equity should be instituted for the purpose of carrying the arrangement into effect.

A bill was accordingly filed, on the 7th of *June 1833*, by the widow and two of the children of the intestate, alleging that it would be beneficial to the children and all persons interested in the estate that the arrangement should be carried into effect. It prayed, that an account might be taken of the intestate's personal estate:— that a proper fund might be set apart to answer the annuity of 1700*l.* due to the widow:— that, if necessary, the real estate might be sold, for the purpose of raising such fund:— that the debts of the intestate might be paid out of the personal estate, as far as was consistent with the deed of arrangement, in a due course of administration:— that it might be ascertained, whether it was for the benefit of the children that the deed should

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be carried into effect, and in that case, that the surviving partners of the intestate might be ordered specifically to perform the stipulations in the deed:—that it might be declared, that the freehold and copyhold estates of the intestate were, under the settlement made on his marriage, charged with and subject to the payment of the annuity of 1700*l.*, thereby provided for his widow for her jointure:—that it might be inquired of what freehold and copyhold estate the intestate died seised or entitled, and to which of his children the same had descended:—that proper directions might be given for the sale of the freehold and copyhold estates of the intestate, or such part thereof as the Court should direct, and for the payment of his debts, and the marshalling and application of his assets and real and personal estates, for the benefit of his creditors and the other parties interested therein, and for other and consequential relief.

By the decree, dated the 24th of *July* 1833, it was ordered that an account should be taken of the intestate's personal estate, debts, and legacies; and that the Master should inquire, whether the surviving partners had paid any of the intestate's debts; and if they had, it was declared that they were entitled to stand in the place of the creditors whose debts they had paid, without prejudice to the deed of arrangement, and as to the partnership debts, not to a greater extent than the intestate's estate, as between them and the intestate, was liable. And the Master was to inquire of what freehold, copyhold, and leasehold estates the intestate was seised, possessed of, or entitled at the time of his death, and which were subject to any incumbrances, and who had received the rents. And it was declared, that the jointure or rent charge of 1700*l.* to the widow, was a good charge on the freehold, copyhold, and personal

sonal estates of the intestate. The freehold estate was ordered to be sold, and the Master was to inquire, whether it would be for the benefit of the children, that the indenture of arrangement should be carried into effect, supposing the copyhold estate to be sold under the same, or supposing that the same should not be so sold, whether it would be more for their benefit that the copyhold estate should or should not be sold, pursuant to that arrangement.

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On the 20th of *February* 1839, the Master made his report upon the several matters referred to him; and, amongst other things, he stated his opinion to be, that it would be for the benefit of the children of the intestate that the deed of arrangement should be carried into effect, whether the copyhold estates should be sold under the arrangement or not, but that it would be more for their benefit, that the copyholds should be sold pursuant to the arrangement, than that the same should not be sold; and it appeared that no creditors remained unsatisfied, the debts having been paid by the widow or the surviving partners acting for her.

By the decree on further directions, dated the 28th of *March* 1839, it was declared, that it would be for the benefit of the infants that the deed of arrangement should be carried into effect; and after directing the freeholds to be sold pursuant to the former decree, it was declared, that it would be for the benefit of the infant that the copyholds should be sold, with the approbation of the Master, to the best purchaser, and that all proper parties should join in the sale, and that the money arising from the sale should be paid into the Bank to the credit of the cause; and it was declared, that after the sale and payment of the purchase-money arising from the copyholds into Court, the infant De-

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fendant, *Charles Calvert*, as the customary heir of the intestate's copyholds, held of the manors of *Isleworth Syon*, *Isleworth Rectory* and *Twickenham*, would be a trustee for the purchaser under the act, 1 *W. 4. c. 60.*; and he was ordered to execute such surrender and assurances as should be proper and approved by the Master.

Under this order, and another order dated the 11th of *June* 1841, a mansion house and lands at *Whitton*, being part of the intestate's estates, and partly freehold and partly copyhold of three several manors, was put up to sale, and was purchased by the petitioner for 9450*l.* She was let into possession, but being nevertheless allowed to object to the title, she stated several objections by her petition, and prayed to be discharged from the contract.

Mr. *Kindersley* and Mr. *Selwyn*, in support of the petition. Where a person purchases property under a decree of the Court, and it can be shewn that there is a material error in the decree, he will not be held to his purchase, but the Court will discharge him, *Lechmere v. Brasier.* (a) The same authority shews that the purchaser is not bound to wait until the error has been corrected.

In the present case, the Court had no authority to sell the estate of the infant. The sale was not directed at the instance of the creditors, but for the purpose of carrying out an arrangement which it was conceived would be beneficial to the family. But an infant's inheritance is never bound by any discretionary act of the Court, *Taylor v. Philips.* (b) In *Simson v. Jones* (c), it

(a) 2 *Jac. & W.* 287.

(c) 2 *Russ. & M.* 365.

(b) 2 *Ves. sen.* 23.

it was held that the settlement by the Court, of an infant's leasehold was not binding. Sir *John Leach* said, "This Court has no authority to give an infant a power of alienation even for her own benefit." (a)

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Though the intestate was a trader, still his copyhold estates were not rendered liable to his debts, either by the 47 G. 3. c. 74., or by the 1 W. 4. c. 47., which only subjected to debts, the real estate of a trader, "which would be assets for the payment of his specialty debts," which copyholds were not. The act of the 3 & 4 W. 4. c. 104. does not apply, as it passed subsequently, and the only way of reaching the copyholds would be by marshalling the assets, as it appears that the annuity of the wife was a charge on the copyholds. The decree is erroneous in not declaring the intestate to be a trader within the acts, in not directing the proper accounts, &c., and in declaring the infant a trustee within the 1 W. 4. c. 60., which he evidently was not: besides this, the Court proceeded on the notion that the eldest son was the customary heir, whereas, as to some part of the property, the youngest filled that character.

They also contended that the mode of taking the accounts before the Master appeared to be erroneous.

*Mr. Pemberton and Mr. Sidebottom, contra.*

No fraud or collusion is suggested in this case; and, therefore, the very important question is, what are the rules of the Court in cases of purchases under its decrees, and how far has a purchaser the right to enter into the correctness of the proceedings, and object to the orders and decrees.

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(a) And see *Russel v. Russel*, 1 *Molloy*, 525.

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The rule is this, that a purchaser is not bound by any irregularity in the proceedings, provided the proper parties are before the Court. All he has to see is, that the decree is made in the presence of all proper parties, and then, whether they be infants or adults, they are all bound by the decree of the Court. *Lloyd v. Johnes* (a), *Curtis v. Price* (b), and *Bennett v. Hamill* (c), in which Lord Redesdale says (d), “The principal question in this case, is one of considerable importance, whether a sale, under a decree of a court of equity is to be impeached on the grounds on which this is sought to be impeached. First of all it is stated, that this is a case in which the heir of the debtor, as not being of age, ought to have had a day to shew cause against the decree, and for this reason, that the decree necessarily required his joining in the conveyance of the estate. I incline to think that that was so, that the decree in that respect was erroneous, and that there ought to have been a day to shew cause. Another objection is, that there was no sufficient account of the personal estate, and that the proceedings before the Master were a fraudulent contrivance between *Mary Bennett* and *Johnson*.” Lord Redesdale, after saying that the latter was a subject which would require investigation, proceeded:—“But as to *Hart*’s representatives and *Hamill*, the question is, whether they are persons who can be affected, supposing the circumstances to be clearly true as stated, namely, that there was error in the judgment of the Court in not giving a day to shew cause, and error also in directing a sale under the circumstances. Now, on that subject I must confess, after considering this a good deal, I think it would be too much to say, that a purchaser

(a) 9 *Ves.* 37.

(b) 12 *Ves.* 89.

(c) 2 *Sch. & Lef.* 566.

(d) Page 576.

purchaser under a decree of that description can be bound to look into all these circumstances ; if he is, he must go through all the proceedings from the beginning to the end, and have the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, as far as I can find, the general impression they give is, that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has, on that investigation, properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court; and he has further to see, that taking the conveyance, he takes a title that cannot be impeached *aliunde*."

It would be absurd after the Court has pronounced its decision, to allow a mere purchaser to re-argue the case by way of appeal.

In this case it is not necessary to decide on the abstract power of the Court over the real estates of infants, for if the rights of the parties had been worked out, the estate would have appeared insolvent, and a sale would be inevitable. The intestate covenanted to secure the 1700*l.* a year out of his real and personal estate, the covenant constituted a lien on his copyholds, and the other creditors would have been entitled to have the assets marshalled.

The Court, in various instances, has bound the rights of infants in respect of their real estate. In *Wall v. Bushby* (a) it was held, that an infant was bound by a decree

(a) 1 *Bro. C. C.* 484.

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decree taken by consent, though there was no reference to the Master; and in cases of election the Court will elect for an infant, and sell the real estate for that purpose.

If an error exists it can be removed within a reasonable time, and an opportunity ought to be given for that purpose.

They also cited *Lutwyche v. Winford* (a), *Lightburne v. Swift*. (b)

Mr. G. Turner and Mr. Willcock, in the same interest, cited *Mallack v. Galton*. (c)

Mr. Kindersley, in reply.

March 13.

*The MASTER of the ROLLS.*

There are three objections to the decree or order on further directions. First, that the sale of the copyholds is directed merely because it was deemed to be beneficial to the infant, and this the Court has no authority to do. Secondly, that this is a case not within the statute of 1 W. 4. c. 60., and, consequently, that the decree is erroneous in declaring the infant *Charles Calvert* to be a trustee within the true intent of that act. Thirdly, that in fact *Charles Calvert* was not customary heir of so much of the land as was held of the manor of Isleworth Rectory and Twickenham.

The first objection depends upon the jurisdiction of the Court. The Court may order real estates vested in infants

(a) 2 Bro. C. C. 248.

(c) 3 P. Wms. 352.

(b) 2 Bell & B. 207.

infants to be sold to satisfy the demands of creditors, or to give to *cestuis que trust* the benefit to which they are entitled, but it has no authority to convert the real estate of infants into personality, or to sell the real estate vested in an infant upon the notion that the conversion or sale would be beneficial to the infant himself, or to himself and others.

In this case it appears to me, that creditors, unfettered by any contrary obligation of their own, might have been aided by the authority of this Court in the sale of this estate, and that in a proceeding adapted to the purpose, a good title might have been made under a decree.

But the widow and the surviving partners are the only persons having legal claims upon the estate, and they have entered into the deed of arrangement, according to the provisions of which, all the creditors were to be paid, and the annuity of the widow was to be fully satisfied, whether the copyholds were to be sold or not.

From the authorities which were referred to in the argument, it is apparent, that if there be jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale or prevent a good title from being made under the decree; and in this case I have not thought it necessary to consider several alleged errors in the mode of taking the accounts, and calculating the claims on the estate. Such errors, even if proved, would not have availed the petitioner.

But if there was no person who had a right to call upon the Court to sell the estate for the satisfaction of a claim, then it is clear, that in substance as well as in words and form, the sale was ordered only on the ground of

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of its being beneficial to the infant to sell, and I think that this is not within the jurisdiction of the Court.

Now, by the deed of arrangement, the surviving partners were to apply the amount of the intestate's interest in the partnership assets, as far as it would extend, in satisfaction of all his debts, and they engaged, personally, to pay all the debts which could not be so satisfied, and they further engaged personally to satisfy so much of the widow's annuity as the other means contemplated by the deed were insufficient to pay, and in this manner, they provided that neither the creditors (by marshalling), nor the widow, under the covenant, should resort to the real estate intended to be saved for the children, and if this were all, there could be no question but that the sale was asked for and ordered only for the benefit of the children.

But then it was part of the argument, that in order to affect the copyhold premises, and to obtain a sale thereof, or the application in manner aforesaid of the rents, and for all the purposes consistent with the arrangement, and more especially as far as might be necessary to effectuate such arrangement, the debts which should be paid by the surviving partners were to be considered, not as discharged, but as kept on foot for their benefit subject to the arrangement, and that they should stand in the place of the creditors whose debts they had paid, or in place of the widow, who, as administratrix, had paid the same, and also in the place of the widow, in respect of monies paid to her on account of her annuity under her marriage settlement.

The object of this part of the agreement was not to enforce a legal or equitable right for the payment of the debt,

debt, but, if practicable, to take advantage of the right (which without the agreement would have existed), merely for the purpose of effecting the arrangement, for the benefit of the children which the agreement was intended to secure to them, and even under this clause, the only foundation for an order to sell was, that the sale would be beneficial to the infant.

I do not think that this is a case of election, in which the Court having the duty of electing for the infant, can, as the result of the election, direct the real estate to be sold. It was I think justly argued, that if an infant entitled by descent to real estate could have a case of election raised by a proposal to do something for his benefit, no case could arise in which means might not be found to give the Court jurisdiction to sell the estate of an infant.

And on the whole, after a consideration of the deed of arrangement, of the form and scope of the pleadings, of the decree and of the report, I think, that the order for the sale of the copyholds was founded solely upon the Master's finding, in conformity with the plain intention of the parties and the real facts of the case, that it would be beneficial to the children that the sale should be made; and looking at the whole arrangement, I think there can be no doubt that the sale would be beneficial to the customary heirs individually. But it appearing that the Court has not jurisdiction to sell the real estates of infants, on the ground that the sale is beneficial to them, I think that the order ought not to have been made, and that a sale under it cannot be enforced.

This being my opinion, it is the less material to consider the other objections, but I think I ought to state, that it does not appear to me that the case comes within the

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the provisions of the statute 1 *W. 4. c. 60.*, and if it ~~be~~
 I think that the purchaser could not have been compelled to wait till an error so material as the declaration of a wrong person being trustee for the purchaser was corrected.

On the whole, therefore, and without entering into the particular objections as to the title, I think that the petitioner is entitled to be discharged from her purchase and to have the stock arising from the investment of the purchase-money paid into Court transferred to her.

And it must be referred to the taxing Master to tax her costs, charges, and expenses incurred in respect of the purchase, including the costs of this petition, the money retained by the auctioneer must be repaid to her, and she must give up possession and account for any rent she has received.

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 Dec. 9, 10, 12.

1845.
 March 13.
 A. became
 surety for B.
 to C. for a
 sum "for
 value received
 by a draft at
 three months
 date." C.
 (without the
 concurrence
 of A.), at once
 paid the
 amount to B.,
 instead of
 giving the draft at three months. Held, that the agreement had been varied, and that the surety was therefore discharged.

BONSER v. COX.

THIS case is reported *ante* (a), and the Lord Chancellor having referred the matter back to the Master, it now came on upon exceptions to his second report.

Mr. Anderdon for Messrs. Morrell.

Mr. Pemberton and Mr. Dixon, for the Plaintiff.

Mr.

(a) 4 *Beavan*, 379.

Mr. *Shebbeare* for the executors.

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The Master of the Rolls.

Davies and *Richard Cox* were partners in the iron trade, *Richard Cox* and the *Morrells* were partners as bankers.

March 13.

In October 1831, four bills of exchange for 500*l.* each, drawn by *Davies* on *Richard Cox*, and accepted by him, payable in three months, were nearly due, and another bill of exchange for 750*l.*, on which *Davies* and *Richard Cox* were liable, was also nearly due.

John Cox, in order to enable *Richard Cox* to obtain from *Cox* and *Morrells* money wherewith to meet two of the 500*l.* bills, and to enable *Davies* and *Richard Cox* to provide for the 750*l.* bill, joined *Richard Cox* in signing two promissory notes, one for 999*l.* and the other for 750*l.*, to *Cox* and *Morrells*, and each of these notes was expressed to be given "for value received by a draft at three months date."

When this case was first before me (a), it was admitted, First, that *John Cox* was a mere surety. Secondly, that the notes of *John* and *Richard Cox* were given for the purpose of enabling *Richard Cox* and *Davies*, respectively, to meet two of the 500*l.* bills, and provide for the 750*l.* bill. Thirdly, that the money was to be raised by discounting the drafts, which were intended to be the consideration for the promissory notes; and 4thly, That in point of fact the drafts were not given.

Messrs.

(a) 4 *Beavan*, 379.

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Messrs. *Morrell* alleged, that although the draft were not given, they advanced money to satisfy the bills which were outstanding against *Davies* and *Richard Cox*, and thus accomplished the purpose which was intended by the whole transaction, and gave to the principal debtor the benefit and accommodation which the surety intended to procure for him.

The executors of *John Cox*, on the other hand, insisted, 1st. That it was not proved that *Cox* and *Morrell* had made any advance to pay the bills which were intended to be satisfied, and 2dly, That if it were proved that they had advanced money to pay those bills, the advance had not been made in such a way as to give to the principal creditor the three months' credit, which it appeared upon the face of the promissory note the surety had contracted for.

Messrs. *Morrell* did not contend that their alleged advance was made any otherwise than by direct payments on account of *Davies* and *Richard Cox*, to the full amount of both the sums for which *John Cox* had become surety. They said, that they had applied the money in paying the bills which *John Cox* intended to have satisfied. They did not allege that their payments were made subject to any deduction for discount, or were made on any special contract as to the repayment.

And on the other hand, the executors of *John Cox* did not allege that Messrs. *Morrell* had so paid the money as to get the bills which were intended to be satisfied into their own hands, with an immediate right of suing upon them.

In this state of circumstances, I overruled the exceptions, on the ground that the advance if made by the Messrs.

~~M~~essrs. *Morrell*, was not made in a manner to give the ~~pri~~ncipal debtor any credit whatever. The outstanding ~~bi~~lls which the surety intended to have paid, were in ~~fact~~ paid and satisfied, and as Messrs. *Morrell* alleged, ~~were~~ paid and satisfied by them ; but the money where-with such payment was made, instead of being raised by the discount of a draft which had three months to run, and in respect of which the principal debtor could ~~not~~ have been sued till the time had expired, was immediately advanced, by a direct payment, to the full amount on the account of *Davies* and *Cox*, in such a way as to give *Cox* and *Morrells* an immediate right to charge *Davies* and *Cox* in account with the full amount of the advance, and this being contrary to the apparent intention of the surety, he appeared to me to be released from his liability. The only question upon the facts stated by Messrs. *Morrell* was whether a surety, who makes himself liable for a loan to the principal debtor to be made in such a way as to secure to the principal debtor three months' credit, is to be held liable, when the loan is so made as not to give that credit.

The case went before the late Lord Chancellor, but unfortunately was so presented to him as not to obtain a decision upon that which was then the only question.

His Lordship was led to suppose, that it had been alleged here, that an equivalent for the drafts mentioned in the promissory notes had been given, by an advance deducting discount, that nothing had been omitted but the mere ceremony of giving the drafts and discounting them, *Messrs. Morrell* having in fact advanced the money less the discount, in such a way as to give to all parties the precise benefit for which they stipulated, and to preclude themselves from making any immediate

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demand till the time of the intended credit had expired; and upon that supposition, his Lordship expressed his dissent to an opinion which he understood to have been stated here, though in fact no such opinion had been expressed, and though the facts upon which such opinion was supposed to have been formed, had never been stated or alleged.

On the other hand, his Lordship was led to suppose that it had been contended by the executors of *John Cox*, that the money advanced by Messrs. *Morrell* was advanced for the purpose of getting possession of the bills and obtaining an immediate right to sue upon them.

So that before his Lordship it appeared to be a question of fact; 1st. Whether Messrs. *Morrell* had advanced a sum of money deducting discount in such a way as to preclude themselves from the right of demanding or suing till the time of credit had expired; or, 2dly, Whether they had so advanced the money as thereby to obtain possession of the bills intended to be satisfied, with an immediate right to sue upon them.

I do not think it necessary to make any remark upon the singular notion that it was anywhere considered to be immaterial what answers were given to these questions. With the impression made upon the mind of the Lord Chancellor, it was necessary to refer the exceptions back to the Master.

And at present, when the Master has made his further report and exceptions have again been taken, we are substantially in the same situation as before.

The executors of *John Cox* did not before, and do not now contend, that Messrs. *Morrell* so advanced the money

money as to obtain an immediate right of suing on the bills which were intended to be satisfied.

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And Messrs. *Morrell* did not before, and do not now contend, that the money was advanced less the discount, or after deducting the discount, or on any special agreement or arrangement.

But they contend, as before, though on an altered state of facts, that they advanced the full money in satisfaction of the bills intended to be satisfied, and argue that by doing so, they did not release the surety.

And the executors of *John Cox* contend, as before, 1st. That there is no proof that the money was advanced in satisfaction of the bills; and, 2dly. That if the money was advanced in the manner alleged by Messrs. *Morrell*, it was not so advanced as to secure the principal debtor the credit which the surety intended for him, and that the surety is therefore released.

The Master has by his report, dated the 28th of *June*, 1842, allowed the sum of 750*l.* and interest as a debt due from the estate of *John Cox* to *James and Robert Morrell*, and has disallowed the claim of Messrs. *Morrell* to the sum of 999*l.*

The Messrs. *Morrell* have taken exceptions to the Master's disallowance of their claim of 999*l.*, and the Plaintiffs have excepted to the Master's allowance of the debt of 750*l.*

This case comes on upon exceptions to the Master's report. One exception taken by Messrs. *Morrell* on the ground that the Master has disallowed the claim made by them against the estate of *John Cox* deceased to the

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amount of 999*l.*, and another exception taken by the Plaintiffs, on the ground that the Master has allowed a claim made by Messrs. *Morrell* against the estate of *John Cox* to the amount of 750*l.*

With respect to the exception of the Messrs. *Morrell*, it appears, that they agreed to advance the sum of 999*l.* or 1000*l.* on having a joint and several promissory note of *John* and *Richard Cox* deposited with them as a security, that in this transaction, *John Cox* was a mere surety for *Richard Cox* or for *Davies* and *Cox*, and that the advance was not to be made by a direct payment in money, but was to be obtained by the discount of a bill which had three months to run, and that this being the agreement upon which *John Cox* assumed his liability and became surety, the arrangement was varied without his authority, and the advance was made directly, and in such a way as to create no credit at all as between the bank and *Davies* and *Cox*. It was so made, as not to give to *Richard Cox* or to *Davies* and *Cox* any free and assured credit for any time whatever. Three months had been stipulated for, and the advance was so made as to create a debt of which payment might have been immediately demanded. This matter is stated in the affidavits of Mr. *Robert Morrell*, sworn on the 14th of November, 1838, of *James Robert Morrell*, sworn on the 6th, and of *Robert*, sworn on the 8th of December, 1841. It is not alleged that *John Cox* was a party to the arrangement said to be afterwards made; and I think that his situation and his interest was or might be materially affected by it. A man may have reason to believe, that a person in pecuniary difficulty may effectually redeem his affairs if allowed time, and may be willing, on the assurance of the required time being allowed, to become surety for the payment of a particular debt at the end of that time, and yet would not become surety, unless

less such time were fully assured to the principal debtor. These are circumstances, which a person advancing money on the security and claiming the benefit of the suretyship does not appear to me to have any right to alter. It is not enough that he voluntarily forbears to demand payment during the time for which the surety had stipulated ; the surety did not intend to rely on his forbearance, but rested on an agreement or condition that the principal debtor should have the time assured to him, and should thereby have an assured and not a precarious freedom during that time. His conduct for his own protection might be materially affected by the difference, and if that stipulated time be not given, and no agreement of the surety to waive it is shewn, it appears to me that the situation of the surety is improperly altered and that he is released. *Bacon v. Chesney.* (a)

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The MASTER of the ROLLS next examined the evidence as to the 750*l.* from which he concluded that *John Cox* was a surety for *Richard Cox* and proceeded :—It is clear that *Richard Cox* did not receive a draft at three months, which was intended by *John Cox*. The money was so taken, as, upon the acquiescence of the Messrs. *Morrell*, an immediate and direct advance of the whole sum, and therefore in this case, as well as in the case of the note for 999*l.*, I think that *John Cox* the surety was released.

The question is of considerable importance, and I think it very much to be regretted, that the parties did not avail themselves of the opportunity which they had, of obtaining the opinion of the late Lord Chancellor upon the subject. I should have been anxious to be guided by his judgment. They pursued a course, which has brought the subject back to me without that assistance,

(a) 1 *Stark.* 192.

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ance, and seeing no sufficient reason to alter the opinion I before expressed, I must adhere to it.

The exception of Messrs. Morrell is overruled and the exception of the Plaintiffs is allowed.

NOTE.—The case afterwards came before the Lord Chancellor upon appeal, who affirmed the decision on the 9th of *March*, 1844.

1842.
May 2.
June 7. 14.

EVANS v. WILLIAMS.

The Plaintiff filed a traversing order. The Defendant afterwards made default in appearing at the hearing. Held, first, that the Plaintiff was not entitled to take as of course, such decree as he could abide by, but must go through his case and take such decree as

to the Court might appear just; and secondly, that service of the traversing order must be proved by affidavit.

THE Plaintiff obtained an order to file the traversing note (a) under the 21st General Order of *August 1841*. (b)

The cause came on for hearing, when the Defendant made default in appearing, and the Plaintiff, on the 2d of *May*, took such decree as he could abide by, which, under the 44th General Order of *August 1841* (c), is absolute in the first instance.

Some doubt having, however, been raised as to the regularity of this decree, the cause was mentioned again on the 7th of *June*, when the first question was, whether it was necessary to prove the service of a copy of the traversing order, and, secondly, whether under the general orders, the Plaintiff was entitled, upon the Defendant's making default in appearing, to take such decree as he could abide by, or whether it was necessary to

(a) 4 *Beev.* 485.(b) *Ord. Can.* 170.(c) *Ord. Can.* 177.

to go through the case, in order that the Court might make such order as might be just, as in the case of a bill taken *pro confesso*. (a)

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Mr. W. M. James argued that it was not usual to produce an affidavit, at the hearing of a cause, as to any proceedings which had been taken therein. That the Court, where it was necessary, had always depended on the certificate of the six clerk that all the previous proceedings were regular; and, further, that the evidence alone taken in the cause and no affidavit, could properly be inserted in the decree.

He submitted, secondly, that as the traversing order had the same effect, "as if the Defendant had filed an answer traversing the whole of the bill, and the Plaintiff had filed a replication to such answer, and served a *subpoena to rejoin*," the Plaintiff was entitled, as in other cases, where the Defendant made default, to such decree as he could abide by.

The MASTER of the ROLLS.

This is quite a new proceeding, and the cause had therefore better be put in the paper on *Tuesday* next.

The cause was again mentioned, when

(June 14.

The MASTER of the ROLLS held, that it was necessary to prove, by affidavit, the service of a copy of the traversing note, and that the Plaintiff was not entitled to

(a) See *Geary v. Sheridan*, *Ready*, 1 *Sim. & St.* 44. *Collins* 8 *Ves.* 191. *Molesworth v. Lord v. Collyer*, 5 *Beav.* 600. *Verney*, 2 *Dick.* 667. *Landon v.*

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to take such decree as he could abide by, but must open and prove his case.

Mr. *W. M. James* then went through the Plaintiff's case, and the Court made such decree as it thought just.

July 7.

JEWIN v. TAYLOR.

A bill containing offensive statements ordered, by consent, to be taken off the file.

MR. *BACON* moved to take a bill off the file with the consent of all parties. He stated that this was a family suit; that the bill contained offensive statements and allegations; and that the parties having compromised were all desirous that the bill should be removed from the records of the Court. He cited *Tremaine v. Tremaine* (a), in which "the cause was between father and son, and there having been great heat and indecent reflections on both sides in bill and answer, and the matter being ended by compromise, upon motion made in Court by Mr. *Porter*, the bill and answer were taken off the file, by consent."

The Master of the Rolls made the order.

(a) 1 *Fern.* 159.



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CARTWRIGHT *v.* SMITH.

Jan. 11.

ON the 6th of *August 1842*, one of the Defendants, *Smith*, filed a demurrer to the whole bill.

The Plaintiff did not set it down for argument within twelve days, in consequence of which, under the 34th Order of *August 1841* (a), it was "held to be sufficient, and the Plaintiff was held to have submitted thereto."

On the 15th of *November* the Vice-Chancellor, to whose Court the suit was attached, made the usual order for the taxation of *Smith*'s costs of the suit, and for payment thereof by the Plaintiff.

On the 25th of *November*, the Plaintiff obtained, upon petition at the Rolls, an order of course to amend the bill as against all the Defendants.

This order was obtained on the simple allegation, as to the Defendant *Smith*, that he had appeared and filed a demurrer on the 6th of *August*. The petition wholly omitted any mention of the order of the Vice-Chancellor.

Mr. *Pemberton* and Mr. *Piggott*, for the Plaintiff, moved to discharge the order to amend. They cited *Mackenzie v. Claridge*. (b)

Mr. *Torriano*, *contra*. There is a distinction between a demurrer being *allowed*, and a demurrer being *submitted to*. Where a demurrer is submitted to, the Plaintiff is at liberty to amend his bill on payment of costs.

(a) *Ord. Can.* 174.

(b) See post, 123.

The Plaintiff submitted to a demurrer by omitting to set it down within twelve days, and the V.-C. ordered him to pay the costs of suit. The Plaintiff afterwards obtained at the Rolls an order of course to amend, suppressing in his petition the order of the Vice-Chancellor. It was discharged for irregularity on the ground of the suppression.

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costs. (a) The order of the Vice-Chancellor is erroneous, as it is only upon the “allowance of a demurrer,” that the Defendant is entitled to his full costs under the 31st Order of April 1828. (b)

If the Plaintiff has acted wrong, it has been in consequence of a slip of the solicitor, who considered that the long vacation was not to be reckoned.

The Master of the Rolls.

I think that this order is irregular, because it was obtained, as of course, on an imperfect statement of facts, suppressing that which was most material, viz. the order of the Vice-Chancellor.

The order was made here on the suggestion, that a demurrer had been filed, and had not been set down, there being at the time an order of the Vice-Chancellor, which still exists, directing the costs of the demurrer and suit to be paid by the Plaintiff. This fact was wholly suppressed.

I cannot say that the order of the Vice-Chancellor was irregular, I am bound to treat it as a valid order until it has been discharged.

As to the right of a Plaintiff to amend his bill and prosecute his suit against a Defendant, where it has been terminated by a slip in not setting down the demurrer, I am by no means prepared to say that he may not be allowed to do so, upon setting the opposite party right as to costs: but the real facts and circumstances of the case

(a) See *Warburton v. The London and Electrical Railway Company*, 2 *Bent.* 235. (b) *Ord. Cas.* 17.

case must be brought forward and stated to the Court, in order that it may be enabled to exercise its judgment on them.

This motion must be granted.

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NOTE.—The rule is different in the case of a plea. If the plea be allowed or submitted to, the parties may nevertheless go into evidence to prove and disprove the facts relied on by the plea. See *Robert v. Jones, post. M. R., 21st December 1843.* (b)

MACKENZIE v. CLARIDGE.

1842.
July 7.

IN this case the Defendant filed a demurrer. The Plaintiff neglected to set it down within twelve days, and, therefore, under the 34th Order of August 1841 (a), it was deemed to have been submitted to.

Mr. Bacon moved, *ex parte*, that the Plaintiff should pay to the Defendant his costs of the demurrer, and also his further costs of this suit.

Where a Plaintiff neglects to set down a demurrer within the twelve days, the Defendant is entitled to his costs of suit and demurrer, and an order for them will be made *ex parte*.

The MASTER of the ROLLS made the order. (b)

(a) *Ord. Cn. 174.*

(b) *Reg. Lib. 1841. B. 1400.*

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Feb. 20.

KING v. WILSON.

A tenant in possession purchased the property, which was represented to be forty-six feet in depth; it turned out to be thirty-three only: Held, that he was entitled to an abatement.

Though time be not of the essence of a contract, it may be made so by notice, where there has been great and improper delay on one side in completing. It may however be waived by proceeding in the purchase after the expiration of the time fixed by the notice.

ON the 20th of *July* 1841, the Defendant, who was the tenant and occupier of a certain freehold house and premises at *Islington*, agreed to purchase the same from the Plaintiff, and by the terms of the contract, the purchase was to be completed on the 29th of *August* 1841.

The particulars stated the property to be *forty-six feet* in depth, when, in fact, the depth was only *thirty-three feet*.

The abstract was delivered on the 31st of *July*, and was returned with requisitions and objections on the 10th of *August*. One of these required proof of the vendor's descent. To meet this, the certificate of the marriage of the vendor's parents was furnished, which shewed that they were married on the 21st of *March* 1794, and this was accompanied by the certificate of the vendor's baptism on the 1st of *June* 1794, but which stated that he was born on the 17th of *April* 1794. The draft of a solemn declaration under the act (5 & 6 *W. 4. c. 62.*) as to this matter, was also sent. This evidence was not satisfactory to the purchaser, who required either the next brother of the vendor to join in the conveyance, or the bond of indemnity of some responsible person.

On the 1st of *September*, the vendor stated that he had no better evidence to offer, nor any corroborative proof, for both the medical man and nurse were dead. He declined the proposal of the purchaser and threatened to file a bill.

Some

Some further correspondence, which is not material, took place between the parties, and ultimately, on the 18th of *September*, the purchaser wrote to say, that if the objection as to the insufficiency of the proof of the descent was not removed within a week, he should consider himself no longer bound, and of this he thereby gave formal notice.

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WILSON.

The vendor afterwards offered to give an indemnity, which proposal the purchaser entertained, but, on the 28th of *September*, objected to the person proposed, and insisted that he was no longer bound by the contract. On the 15th of *November* the vendor furnished the solemn declaration of a party present at the marriage, but the purchaser refused to renew the subject, and this bill for the specific performance was in consequence filed on the 27th of *November* 1841.

The cause now came on for hearing. The Plaintiff entered into no evidence in the cause as to his descent, and the Defendant insisted that the contract had been put an end to, and also that the abstract furnished did not go back far enough.

Mr. *Pemberton* and Mr. *S. P. White*, for the Plaintiff, asked for a reference to the Master as to the title, and as the Defendant had raised an untenable defence that the contract had been rescinded, they argued that the Defendant should, at once, be ordered to pay the costs up to the hearing.

Mr. *Kindersley* and Mr. *Dunn*, contra, contended that as the Plaintiff had failed to comply with the reasonable requisition of the purchaser, within the time limited by the contract and by the notice, the contract had been put an end to.

Secondly,

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Secondly, that the conduct, default, and laches of the Plaintiff had been such, as to disentitle him to any relief in this Court.

Thirdly, that if the purchase was to proceed, then, that there having been a great misrepresentation as to the quantity of the land sold, the purchaser was entitled to compensation for the deficiency in quantity.

Fourthly, that no special order ought to be made as to the costs up to the hearing, especially as the suit had originated from the default of the Plaintiff in furnishing satisfactory evidence as to his descent.

Mr. S. P. White, in reply. The Defendant is not entitled to any compensation for the erroneous description. He was tenant and in possession of the premises, and well knew what the property was which it was the intention of the Plaintiff to sell, and which he intended to purchase.

Taylor v. Brown (a), and *Hyde v. Dalkray* (b), were cited.

The Master of the Rolls.

The first question in this case is, whether the contract has been put an end to. Now I am clearly of opinion that though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed; that time will then be considered by this Court as having become of the essence of the contract; and in case the party makes default in doing what is right and proper

proper on his part, within the time so fixed, it will be a reason why this Court will not afterwards interfere in his favour to compel the execution of the contract.

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The question is whether those circumstances occur in the present case. I cannot help thinking that the conduct of the vendor in this case was not satisfactory with respect to the proof required of his legitimacy. The first certificate stated the marriage to have taken place in *March*, and the certificate of the baptism, (which is no evidence whatever of the birth) shows the baptism to have taken place in *April* following. It therefore seems to have been necessary to inquire very minutely into the circumstances, and when the birth really took place. The correspondence is not material, until we come to the 1st of *September* 1841. There was then a real objection, and the only mode proposed for removing it, was by tendering the declaration of the mother. I do not think it material that the declaration was sent without signature, and without having gone through the usual formalities, though it was a very good reason for returning it in order that it might be perfected. The parties did not agree upon the mode of removing the objection; the purchaser's solicitor on the 18th of *September* says, "If this objection is not removed within a week, I shall consider my client no longer bound, and of this I beg to give you formal notice." Now I must say, that under the circumstances, this was rather too short a time, it was not reasonable to require every thing to be done within a week. However that might be, I think that under the circumstances of this case, the contract was not put an end to; for we find these gentlemen (meaning I dare say that the correspondence should be continued without any prejudice) afterwards proceeding in the matter, and considering whether a satisfactory indemnity could not be had; in which event,

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event, it is not disputed, the contract might be completed without regard to the letter fixing the time within which it was to be done; so that there was something, which might have been done, after the expiration of the time fixed by means of which the contract would have been completed. It appears to me under the circumstances that the contract is not put an end to.

The next consideration here is, whether the conduct of the Plaintiff has been such, that the Court in its discretion will refuse to grant a specific performance. Now really the whole question under discussion between the parties, and in issue in the cause, or nearly so (for although other objections have been spoken of, yet they have not been stated in a way to make me attach any weight to them), was as to the legitimacy of the Plaintiff. When the Plaintiff was called upon to prove it, I think it would have been better to have procured the necessary proof at once, but I do not think that the circumstance of not having done so is a reason why this bill should be dismissed, especially when the Defendant, by his answer insists that the contract was put an end to, and not on the default in procuring the requisite evidence. Seeing that there is an existing contract, I think there is no reason why it should not be specifically performed.

The next question is as to the compensation, and I am of opinion that compensation ought to be given. The depth sold is forty-six feet, whereas the vendor had only thirty-three. It is said that no deception could have been practised, because the Defendant was in possession of the premises, and, being in possession, he must have known that it was a mistake, and that there were only thirty-three feet. Now I don't know that persons

persons in the occupation of premises are in the habit of measuring them; I think you would find very few persons who know the exact depth and frontage of their premises. The purchaser had it stated to him that the property was forty-six feet in depth, and it is a remarkable circumstance, that the particulars having stated forty-six feet in depth, the abstract of title describes the premises as thirty-three feet. That was objected to immediately. It is said you have described it as forty-six feet when in point of fact there are only thirty-three. What was the answer made by the solicitor of the vendor? In substance it is this, recently there has been an admeasurement and by the admeasurement it appears that there are forty-six feet. Was the Defendant then to blame in not going to ascertain and measure it? I cannot say he was. The representation was in perfect conformity with the particulars, and I see no reason at all why he was to test the reiterated representation by an actual admeasurement. Further, I see no reason for thinking that the purchaser might not have formed his plans as to the property, with reference to the notion that there were forty-six feet in depth.

It has been urged, with great ingenuity, that the excess of representation being very great, (thirteen out of forty-six,) ought to have attracted the attention of the purchaser, but why did not the vendor, who ought to have known something about the matter, and who had caused a recent admeasurement to be made, communicate to the other side that it had been ascertained to be thirty-three, and not forty-six feet? I think on the whole that there is a right to compensation.

The other question is with respect to the costs of the cause up to the hearing; some things have occurred in

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this

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this case, from which I think that the Plaintiff is not entitled to those costs. There must be a reference to the Master as to the title, and to ascertain the amount of compensation, and the costs must be reserved.

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 Dec. 22.

1843.

Jan. 19, 20.
 Where a
 guardian ~~ad~~
~~item~~ of a per-
 son of un-
 sound mind,
 though not so
 found by in-
 quisition dies,
 a special ap-
 plication is
 necessary to
 obtain the
 appointment
 of a new
 guardian, and
 an appoint-
 ment by an
 order of course
 is irregular.

NEEDHAM v. SMITH.

IN 1839 the Defendant, *John Needham*, was of unsound mind, though he had not been found lunatic by inquisition, and the Court in that year appointed *Mr. Hunt* to be his guardian, to defend the suit. (a)

In August 1842, *Hunt* having died, an order was obtained, as of course, whereby, on the humble petition of *John Needham*, a person of unsound mind, *Thomas Wainwright* was assigned guardian of the petitioner in the room of *Hunt*, deceased. This order was obtained, as of course, and without any evidence as to the present incapacity of *John Needham*.

A motion was made to discharge the order, on the ground of the irregularity. Affidavits were filed as to the present mental competency of the Defendant.

Mr. Turner, in support of the motion.

Mr.

(a) See *Reddick* (4th ed.) 103, 104. *Howlett v. Wilbraham*, 5 *Med.* 423. *Lee v. Ryder*, 6 *Med.* 294. *Brooks v. Jobling*, 2 *Hare*, 155. *Ord. Com.* 217. 1 *Dan. Pr.* 220, 248. *Easterby v. Hemmick*, *Reg. Lib. A.* 1835. fol. 5. *Smith v. Annesley*, *Reg. Lib. B.* 1833. fol. 398. *Mayo v. Wright*, *Reg. Lib. B.* 1836. fol. 86. *Miller v. Smale*, *Reg. Lib. B.* 1823. fol. 1759.

Mr. *Koe* and Mr. *Terrell*, *contra*.

Mr. *Pemberton*, for the Plaintiff.

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v.
SMITH.

The Master of the Rolls was of opinion, that it was irregular to obtain the order as of course. He said, that where a party was found lunatic by inquisition, he was presumed to remain so during the existence of the commission; but where the lunacy had not been so found, and the Court took on itself to appoint a guardian *ad litem*, then the Court presumed that the same state of mind continued so long as the guardian retained the authority committed to him; when, however, that authority ceased, even by the death of the guardian, the presumption in favour of sanity revived. That as the present order ought not to have been obtained except upon a special application, it ought therefore to be discharged.

His Lordship also adverted to the evidence of present sanity, and said, that if it had been brought to the notice of the Court, the order complained of would not have been made.

BASSFORD *v.* BLAKESLEY.

1842.
Jan. 27.

THIS suit was instituted for the purpose of setting aside a series of conveyances nearly voluntary obtained by a nephew from his aged uncle.

Where deeds are impeached for fraud, the mere allegation of fraud by the bill will not entitle the

Plaintiff to an order for their production; on the other hand, in order to obtain a production, it is not necessary that the fraud should be admitted by the answer, the Court must look at the circumstances of each case.

Order made for the production of a deed impeached for fraud, though the fraud was denied by the answer, the case on the whole being such as to render an inspection proper.

1842.
 —————
 BASSFORD
 v.
 BLAKESLEY.

In 1837 the Plaintiff lost his only daughter, in consequence of which (as was alleged), he became overwhelmed with grief. The Plaintiff at this time was nearly seventy years of age, and possessed estates of considerable value; and, in *April 1838*, he conveyed one of those estates to the Defendant, his nephew, reserving thereout a life estate only, and an annuity of 100*l.* a year for any wife he might marry.

In *June 1838*, the Plaintiff conveyed a second estate to the Defendant, reserving thereout a life interest; and, in *June 1839*, he granted to the Defendant a lease of the property during the Plaintiff's life at an inadequate rent.

In *August 1840*, the Plaintiff being on the point of marrying again, released to the Defendant the annuity of 100*l.* a year; and, in *December* following, he also conveyed to the Defendant his life estate. In these different transactions a small and mere colourable consideration was purported to be given; but, in the result, the Plaintiff completely denuded himself of the whole of his property, worth more than 14,000*l.* in favour of the Defendant.

The Plaintiff alleged that these deeds had been obtained by fraud, deception, and undue influence, and that the Defendant had procured them by practising on the fears and weakness of the Plaintiff.

The Defendant by his answer, which was of considerable length, though he denied these allegations, stated that the Plaintiff had long entertained a great regard for the Defendant, who was his heir apparent, and had long determined to provide for him; that the conveyances had been made by his uncle of his own free will out of regard to the Defendant, and for some other

con-

consideration, with the assistance of a separate solicitor on each several occasion. The case, however, made by the Defendant himself was one of great suspicion. The answer set out the conveyances at some length, and admitted them and the title-deeds to be in the Defendant's possession.

1842.
~~~~~  
BASSFORD  
v.  
BLAKESLEY.

*Mr. Moore*, in support of the motion.

*Mr. G. Turner*, *contra*, resisted the production of the conveyances, which were the Defendant's title-deeds. He argued that the mere allegation of fraud was not sufficient to entitle the Plaintiff to the production; that as the fraud had been denied by the answer, and as the deeds in question would not prove the Plaintiff's case, he was not entitled to see them. He cited *Tyler v. Drayton* (a), and *Kennedy v. Green*. (b)

*The MASTER of the ROLLS.*

I perfectly agree, that where a bill alleges that deeds have been obtained by fraud, and the answer entirely denies the fraud and states the deeds, the Plaintiff is not, in that situation of things, entitled to an order for their production.

On the other hand, it is not necessary, in order to entitle the Plaintiff to the production of the deeds, that the Defendant should admit that there has been fraud.

The Court must look to the circumstances of each case, and looking to the circumstances under which these deeds have been obtained, I think it is quite reasonable that the deeds should be produced. Here are

(a) 2 *Sim. & St.* 309. *Neate v. Latimer*, 2 *You. & C.*

(b) 6 *Sim.* 6. And see *Balch* (*Exch.*) 257.; 11 *B&B*, 112. and *v. Symes, Turn. & Russ.* 27. 4 *Cl. & Fin.* 570.

1842.  
 BASSFORD  
 v.  
 BLAKESLEY.

are conveyances from an old man under very extraordinary circumstances and almost without consideration. It is said these are the Defendant's title-deeds, but, according to his own statement, he has no title except what he derived by gift from the Plaintiff. I think that the Plaintiff should be at liberty to see what he has done, and that the Defendant should produce these deeds.

I agree with the rule stated by the Defendant's counsel, that a Plaintiff is not, upon a mere allegation of fraud, entitled to the production of deeds which are impeached; but here is not only the allegation of fraud, but circumstances which shew me that the Plaintiff is fairly entitled to have the matter inquired into.

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NOTE.—The cause afterwards came on for hearing on the 30th of April 1844, when upon concessions being offered by the Defendant, the case was compromised.

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Dec. 16. 22.

### TARBUCK v. TARBUCK.

A petition was presented in the names of *A.* and *B.*, but without the authority of *A.* Held, that having regard to the rights of the respondents, the petition could not be ordered to be taken off the file on the application of *A.*

**M**R. *WARD*, a solicitor, presented a petition in the names of *Hannah Tarbuck* and *Francis Tarbuck*.

A motion was made on behalf of *Hannah Tarbuck*, that the petition might be taken off the file, or that her name might be struck out, and that all proceedings by *Ward* might be stayed. The ground upon which the application was made, was, that *Ward* had no authority to act for *Hannah Tarbuck*.

Mr. *Rolt*, in support of the motion.

Mr.

Mr. *Pemberton* and Mr. *Rogers*, *contrâ*.

*Wiggins v. Peppin (a), Lord v. Kellett (b)*, were cited.

1842.

TARBUCK  
v.  
TARBUCK.

A similar motion was made on behalf of *Francis Tarbuck*.

*The Master of the Rolls.*

I am of opinion upon the affidavits, that *Francis Tarbuck* never withdrew his authority to Mr. *Ward* until after the petition was in the paper, but I think that *Hannah Tarbuck* had withdrawn her authority. *Hannah Tarbuck* asks that the petition may be taken off the file, but having regard to the interest of the respondents who are entitled to have some order made on it, I think that this cannot be done, and that the only order that I can make is, that *Hannah Tarbuck*'s name ought not to be used.

(a) 2 *Beav.* 403.

(b) 2 *Myl. & K.* 1.

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LORD MOSTYN v. SPENCER.

Jan. 26.

1843.

Feb. 22.

THIS was a motion on behalf of the Defendant, that the depositions of a witness examined under a commission on behalf of the Plaintiff, might be suppressed for irregularity.

By the decree made in the cause, certain inquiries were directed, and a commission having become necessary

Depositions suppressed after publication, on the ground that one of the commissioners was the nephew and agent of the Plaintiff.

The fact of publication having passed, or the death of the witness, will not prevent the suppression of the depositions, when the commissioner is disqualified by interest, provided the application be made within a reasonable time after the discovery of the objection.

1843.  
 Lord Mostyn  
 v.  
 Spencer.

sary to examine witnesses on behalf of the Plaintiff, an order for such commission was made in *January 1841*, but the Defendant did not join therein.

One of the commissioners named by the Plaintiff was *Cymric Lloyd*, who was the nephew and agent of the Plaintiff. The nature of his agency did not appear on these proceedings, and the relationship between the Plaintiff and *Lloyd* was not known to the Defendant till some time after.

On the 5th of *March 1841*, the commission was executed by *Lloyd* and another commissioner at *Caen*, and *Pugh* was examined thereunder. Publication having passed, the depositions were delivered out in *December 1841*. In *January 1842* the Defendant objected to the evidence of *Pugh*, on account of his interest. The case proceeded in the Master's office, and on the 15th of *December 1842*, upon the return of the Master's warrant to settle his report, the name of *Cymric Lloyd* being observed by the Defendant's solicitor, an inquiry was made, when it appeared that *Cymric Lloyd* was the nephew and agent of Lord *Mostyn*. Notice of this motion was thereupon given.

The witness *Pugh* had since died.

Mr. *Kindersley* and Mr. *Teed* in support of the motion.

“ No person can take part in the execution of a commission who is not wholly indifferent.” *Cooke v. Wilson* (a), and where depositions are taken by commissioners who are disqualified by their connection with the parties to the cause, the Court, even after publication, will suppress them.

It

(a) 4 *Mad.* 580.

It is stated in the *Practical Register* (a), that "the common exceptions to commissioners are these: that he is of kindred, allied to the party for whom he is named," &c., "or any other apparent cause of partiality, or siding with either party."

1843.  
Lord MOSTYN  
v.  
SPENCER.

So in *Hinde* (b), it is said, "Commissioners ought to be indifferent persons; and after commissioners are struck, if it be discovered that one or more of the commissioners is or are nearly allied, of counsel, solicitor, master, or partner with the Plaintiff or Defendant, or any apparent cause of partiality, or siding with either party can be shewn, the Court, upon motion, or the Master of the Rolls upon petition, will order the opposite party to name commissioners *de novo*."

Here, the commissioners stood in the relation both of nephew and agent to the Plaintiff. The depositions have been irregularly taken, and the Defendant having made his objection immediately upon the discovery of it, they ought now to be suppressed.

Mr. *Turner* and Mr. *Craig*, *contra*, contended, that the objection was made too late; that the commissioners having been named in January 1841, the Defendant and his agents then knew of the appointment of *Cymric Lloyd* as a commissioner, and that from the facts proved, he must have known of his relationship to the Plaintiff; that he had proceeded on the evidence, and had waived the objection, and that as the Court had a discretion, it ought not to exercise it, so as to prejudice the Plaintiff, now that he was deprived, by the death of the witness, of the opportunity of re-examining him; the more especially as there was no suggestion of any unfairness

(a) Page 121.

(b) Page 304.

1848.  
 Lord MOSTYN  
 v.  
 SPENCER.

fairness having been practised, and as the Master had prepared his report founded on this very evidence. *Gordon v. Gordon* (a), was cited.

*The MASTER of the ROLLS.*

This motion is of so much importance, both as regards the practice of the Court, and the interest of the parties, that I shall not dispose of it without further consideration. The only question seems to be, whether the party making this application is precluded, by the length of time or from the circumstances of the case, from making this application. A question has, to my great surprise, been raised, whether depositions can be suppressed, on the ground of a commissioner being a person engaged in the interest of one of the parties to the cause. There is nothing more clear, and if it had now to be decided for the first time, I should not have the least hesitation in so deciding. Persons appointed by the Court to take depositions must be impartial, and if they are appointed in such a way as not to secure that important object, it is the duty of the Court to suppress the depositions: of this, I conceive, there cannot be a doubt.

But if a party is cunning enough to get a person interested appointed commissioner, and the objection is not observed, is the Court to receive evidence tainted by partiality? The doctrine is too important to be passed over without observation. Commissioners are the officers of the Court, though they are nominated and proposed to the Court by the parties; the Court entrusts the parties with their nomination, subject to their being struck off by the opposite party, and to this sanction,

(a) 1 *Swans.* 166. and 1 *Wils. C. C.* 155.

sanction, that if it turns out that the persons are improper, the evidence shall not be available.

1843.

Lord MOSTYN  
v.  
SPENCER.

The argument used at the bar with reference to what ought to be done by the Court in such a case, is most important. Suppose that a person is appointed a commissioner whom the Court would not knowingly have appointed, he not being likely to deal impartially between the parties. If the objection be known to the opposite party, and with such knowledge he permits the proceeding to go on, running the chance of having the evidence in his favour, but resolved to take advantage of the point of form, if the evidence should turn out to be against him, can the party acting in such a manner be allowed, after publication, to come to this Court for the suppression of the depositions? This argument is most material, and I must carefully examine these affidavits with this view. It is the duty of a person desirous to object to the regularity of proceedings, to make the objection as early as possible. The point is this, was the Defendant aware of this objection, or were the circumstances such that he ought to have known it? He cannot avail himself of any irregularity, if there has been negligence on his own part; but if he really did not know of the objection, and came forward at the earliest period he could, is it now too late? It is said that he ought to have applied to the Court before the depositions had been read in the Master's office, and that it is now too late to bring forward the objection. I find it difficult to believe that Lord *Eldon* expressed any such opinion in *Gordon v. Gordon*: his observation applied to the case before him: he never intended to say that if one party concealed the objection, and the other brought it forward at the earliest moment after he discovered it, he cannot avail himself of it, after the deposition has been once read.

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1843.

Lord Mostyn  
v.  
Spencer.*The Master of the Rolls.*

This motion is made by the Defendant for an order to suppress the depositions of *William Pugh*, as being irregularly taken.

The depositions were taken on behalf of the Plaintiff, under a commission in which the Defendant did not join; and the Plaintiff having named his own commissioners, the objection is, that one of the commissioners, whom he named and who acted on the execution of the commission, was his nephew and agent.

I am of opinion that it was clearly wrong to insert the name of the Plaintiff's nephew and agent as a commissioner. The Court would not, knowingly, have appointed as its minister for the execution of a commission to examine witnesses, a person whose connection and employment rendered him so liable to be biased. The nomination of commissioners is intrusted to the parties, subject to all the consequences of improper nomination, and it would lead to the most dangerous consequences, if parties were allowed to avail themselves of the evidence taken under commissions upon which they had placed their own agents; and accordingly, the Court has suppressed the depositions, when taken under a commission, in which a solicitor (*a*) in the cause, or the clerk of a solicitor (*b*) in the cause has been named as a commissioner. I conceive that a person who is acting for the party as his agent, though he may not be his solicitor, is not less objectionable than if he were so; not being a solicitor, he may perhaps be

(*a*) *Fortescue v. Coake, Godb.* (*b*) *Newton v. Foot, 2 Rep. in 193. Fricker v. Moore, Bunn. Ch. 393. and 2 Dick. 793. Coake 289. and Selwyn's Case, 2 Dick. 563. v. Wilson, 4 Mad. 380. Chameau v. Riley, Rolls, 9th Dec. 1840.*

be considered as less likely to be aware of the duty of being strictly impartial on such an occasion. It is not a valid objection to an application of this sort, that publication, has passed, if the party complaining comes within a reasonable time after he has discovered the objection; and the real question upon this motion is, whether the Defendant has come in a reasonable time.

1843.  
Lord MOSTYN  
v.  
SPENCER.

It appears that Mr. *Burdekin*, who was then a Defendant to the cause, was introduced to Mr. *Cymric Lloyd* on the 9th *December* 1839, and was then informed that Mr. *Cymric Lloyd* was a relation of the Plaintiff. This was after the decree was made, but a full year before the time when the Plaintiff obtained the order to examine witnesses; and I am of opinion, that the knowledge then imparted to *Burdekin* that the Plaintiff had a relation called *Cymric Lloyd*, does not justify the supposition, that *Burdekin* must have known that Mr. *Cymric Lloyd* named in the commission which issued more than a year afterwards, was the same Mr. *Cymric Lloyd*, a relation of the Plaintiff, and also his agent.

In *February* 1841, it was first known that *Cymric Lloyd* was named as a commissioner; there was not, at that time, any knowledge that he was the Plaintiff's agent, and it does not appear that the Defendant then knew that he was the Plaintiff's relation; the cause and the execution of the commission proceeded, on the supposition that the commissioners had been duly nominated. After publication, an objection was taken to the evidence of *William Pugh* who had been examined under the commission, on entirely different grounds, and it failed. The taking of and relying on this objection alone, appears to me to be wholly inconsistent with the notion that the Defendant knew of the objection now made.

It

1849.  
 Lord MOSTYN  
 a.  
 SPENCER.

It was not till *October 1842*, that the Defendant agent knew that a Mr. *Cymric Lloyd* was the agent the Plaintiff, and not till *December 1842*, that the *Cym Lloyd*, the Plaintiff's agent, was known to be the Plaintiff's near relation and the commissioner who acted in execution of the commission.

The nature of the agency has not been explained; no evidence on the subject has been given on the part of the Plaintiff, and I have therefore no reason for inferring, that the agency was not of a nature to give a bias which it is so necessary to avoid. It is not without reluctance that I make the order. The witness is dead; there was no charge of partiality of conduct, and the Plaintiff may be deprived of evidence very important to his case. But it cannot be permitted to parties to name their own agents and relations to be commissioners; the examination of witnesses, and if there be no fraud, neglect, or default on the part of those who complain, does not appear to me that the Court would be justified in refusing the ordinary remedy, on the ground that the wrong had been long unknown, or because the party committing the wrong had been successful in concealing his malpractice for a long time. I must therefore order the depositions to be suppressed.

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NOTE.—The Plaintiff appealed to the Lord Chancellor

1843.

## STARTEN v. BARTHOLOMEW.

Jan. 16.

**T**WO suits were instituted on behalf of infants. The Court having referred it to the Master to ascertain which of the two suits was most for the benefit of the infants (a), the Master reported in favour of the second.

A petition was now presented to confirm the Master's report, and to dismiss the first suit with costs to be paid by the next friend or his solicitor.

The first suit was instituted by Mr. R., a solicitor, without any authority whatever. He nominated his brother as next friend. Mr. R. was intimate with the father of the infants, and had been concerned for their deceased mother, but his brother was a stranger to the family.

It is not necessary to go into the details of the circumstances of the case, further than to state, that the Court, upon this application, was of opinion, that under the circumstances of the case, and having regard to the adverse claims of the father an insolvent debtor, it was proper to have instituted a suit on behalf of the infants. Mr. R., the solicitor, had stated his intention, by means of the suit, to procure payment of a sum which he claimed to be due from the mother of the infants. It also appeared, that the next friend was a mere nominee of the solicitor, and the bill being filed on the 18th of July 1842, the *subpoenas* were not served, and no notice given to the Defendants. The second suit

Two suits were instituted on behalf of infants, but it was found that it was most for their benefit to prosecute the second. The first suit was properly instituted; but there being some impropriety of conduct on the part of the solicitor, who instituted it on his own authority, and nominated his brother as next friend, the first bill was, upon an interlocutory application, dismissed without costs.

1843.

STARTEN  
v.  
BARTHO-  
LOMEW.

suit was instituted on the 28th of *July*, without notice ——  
of the existence of the first suit, and no intimation of ——  
the existence of the first suit was given till after the ——  
filing of the second bill.

**Mr. Parsons**, in support of the application.

**Mr. Bayley**, for the trustees.

**Mr. Wood**, *contra*.

**Mr. Parsons**, in reply.

*The Master of the Rolls.*

In cases of this kind, the Court exercises a very ——  
careful discretion, on the one hand, in order to facilitate ——  
the proper exercise of the right which is given to all ——  
persons to file a bill on behalf of infants, and on the ——  
other to prevent any abuse of that right, and any wan- ——  
ton expense to the prejudice of the infants.

There are great complaints in this suit of the bill ——  
being filed by a stranger. I must, however, say, that if ——  
it is proper for the protection of the infants to institute a ——  
suit, such suit is not, on that ground alone, to be found ——  
fault with, nor is a party on that account to be charged ——  
with the costs, if it should turn out, upon inquiry, that ——  
the suit is for the benefit of the infants. On the other ——  
hand, if a bill be filed by the nearest relative of an infant ——  
and it turns out that it was filed not for their benefit, but ——  
for the private interest or purposes of the next friend, ——  
such a party would be charged with the costs of the suit.

The question is, not whether there was authority from ——  
the father of the infant to file this bill, but whether a ——  
mere stranger has filed this bill, without regard to the ——  
interests of the infants, and for his own purposes.

I have

I have had several of these cases before me, in which I have had to determine whether the bill was filed improperly, and to make orders adapted to the circumstances of each particular case; it has been my duty not to discourage the filing of proper bills on behalf of infants for the protection of their estates, but at the same time to prevent improper bills being filed on their behalf.

This is a case in which *ex concessis* it was clearly proper to file a bill; the interest of the infants in this case being such that it was impossible for the trustees to act without the direction of the Court.

On the reference, the Master has found that the second suit is the most proper to be prosecuted. The consequence is, that there is one bill filed which will be beneficial to the infants to prosecute, and a subsequent bill filed, which will be more beneficial to be prosecuted. What, according to the ordinary practice of the Court, is next to be done? If no fault is to be found with the first suit, the ordinary course is to stop it, and to give costs to the next friend, although the first suit may not be as beneficial to the infants as the second.

It is said such an order will not meet the justice of the case, because the bill was improperly filed. I think that Mr. R. was wrong in two or three things. He was wrong in saying he would use the suit as the means for obtaining payment of his debt. Again, he ought not to have nominated a next friend of his own authority; I certainly do not think it right for a solicitor who may consider it right to institute a suit for infants, nominally to put forward the name of another person, but in reality to prosecute it himself.

1843.  
STARTEN  
v.  
BARTHOLOMEW.

1843.

STARTEN  
v.  
BARTHOLOMEW.

In the third place, I think that after filing the bill, he ought, without delay, to have served the *subpoena*, and have given notice to the trustees who were to answer. He did not do that for ten days, and in the mean time another bill was filed, and this has created a very useless expense.

Under all these circumstances, I think I must dismiss the first bill without costs, and the costs of all other persons must be costs in the second suit.

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NOTE.—See *Sale v. Sale*, 1 *Beav.* 586. *Fox v. Suwerkrop*, *ibid.* 585. *Guy v. Guy*, 2 *Beav.* 460. *Mortimer v. West*, 1 *Wil. C. C.* 159.

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Jan. 19.

## DRYDEN v. FOSTER.

## DANSON v. FOSTER.

A creditor's bill was filed, which also prayed other relief. Soon after a purely creditor's suit was instituted by another party, and a decree obtained therein within seven days. The Court stayed the first suit so far only as it prayed an administration of the assets.

THE first of these suits was instituted on the 2d of November 1842, on behalf of the creditors of the intestate, and prayed for the administration of the estate, and that certain partnership accounts should be taken. No answer had been put in.

The second was a simple creditor's suit, instituted on the 6th of December 1842, and seven days afterwards, and on the 13th of December, a decree was obtained.

Mr. Pemberton and Mr. Bayley moved, in the second suit, to stay the proceedings in the first.

Mr. Renshaw, *contra*, objected that the two suits were not precisely for the same object; that the first suit asked that certain accounts might be taken with respect

to

in a partnership business, and also for an injunction and receiver, and an occasion might arise in which it might be proper to grant them. He urged also, that the second decree had been obtained by collusion.

*The Master of the Rolls* ordered, that all further proceedings in the first suit, so far as administration of the assets of the intestate was thereby sought, should be stayed; and he gave to the Plaintiff in the first suit liberty to go before the Master in the second, and prove for what he might eventually establish in the first cause. (a)

(a) *Reg. Lib. A. 1842. fo. 497.*

1843.  
DRYDEN  
v.  
FOSTER.  
DANSON  
v.  
FOSTER.

ROBINSON *v.* BRUTTON.

*Feb. 11.*  
*March 20.*

ON the 22d of *May* 1841, the next friend of the Plaintiff was ordered to give security for costs, and he accordingly executed the usual bond to the Six Clerks, *Vesey* and *Allen*.

Liberty given to sue on a bond given to the late Six Clerks, as a security for costs, upon a proper indemnity.

On the 22d of *November* 1842, the bill was dismissed with costs; and the next friend being abroad, "the Defendant applied to the officer who had the custody of the bond to deliver it over to him, in order to proceed against the surety, on his receiving an indemnity for the costs of any proceedings which might have to be taken in the name of the Six Clerks, but it was refused, on the ground that there were no longer any Six Clerks in existence (a), and, consequently, they could not consent to

the

(a) *5 & 6 Vict. c. 103.*

*L. 2*

1843.

ROBINSON

v.

BRUTTON.

the use of their names, nor could they authorise the handing of the bond to the Defendant's solicitor.

Mr. *Simpson* moved that the Defendant might be at liberty to put the bond in suit, and use the names of the obligees.

*The Master of the Rolls* said he would make inquiry before he made any order.

March 20.

*The Master of the Rolls* now ordered, that the Defendant should be at liberty to put the bond in suit, and for that purpose he ordered the bond to be delivered by the proper officer to the Defendant; and he further ordered that the Defendant should be at liberty to make use of the names of *Vesey* and *Allen*, and should first give proper indemnity, to be settled by the Master in case the parties differed. (a)

(a) Reg. Lib. 1842. B. 562.

Jan. 18.

ALLAN v. HOULDEN.

One of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of

THIS case came on upon general demurrer, and the general outline of the case was as follows.

In 1838, the Defendant *Houlden* agreed to sell to *Sherman* his business of upholsterer and stock to the value

fraud, and prayed an account of the payments of the bond. Held, that the principal debtor and the co-surety were necessary parties, notwithstanding the 32d order of August 1841.

A demurrer for want of equity and want of parties, succeeded only on the latter ground. No costs were given.

value of 2000*l.*, the valuation to be made by two indif-  
ferent persons.

The Plaintiff *William Allan* together with *George Allan* agreed to become sureties, and they joined *Sher-  
man* in a bond to *Houlden* for securing the 2000*l.*

1843.  
ALLAN  
v.  
HOULDEN.

The bill alleged various frauds on the part of *Houlden* in this transaction; first, that *Houlden* had greatly misrepresented the amount of the profits of his business, which was the inducement to purchase the stock. That the valuation of the stock had been improperly and fraudulently made by a friend of *Houlden* alone, and that *Houlden* had not performed the stipulations on his part. The bill stated, that payments had been made in discharge of the bond exceeding the value of the stock; that an action had been commenced thereon against the Plaintiff, and it prayed that an account might be taken of the sumspaid on account of the bond, and that the bond might be delivered up to be cancelled, and for an injunction.

Neither *George Allan* the co-surety nor *Sherman* were made parties to this bill.

The Defendant filed a demurrer for want of equity, and for want of parties.

Mr. *Turner* and Mr. *Heathfield*, in support of the demurrer, proceeded first to argue the demurrer for want of equity; but the Master of the Rolls, without hearing the other side, intimated his clear opinion, that it could not be sustained.

They then argued that the suit was defective for want of parties. That the transaction could not be partially

1843.  
 ALLAN  
 v.  
 HOULDEN.

set aside; *Myddleton v. Lord Kenyon* (a); and if it was to be totally set aside, then *Sherman*, the principal, and *George Allan* the co-surety ought to be before the Court. That the bill also prayed an account, which could only be effectually taken in the presence of all parties interested, otherwise a succession of bills might be filed for the same object, and the accounts be repeatedly taken; besides this, *Sherman* had possession of the goods which, upon setting aside the whole transaction, ought to be restored.

Mr. *Pemberton* and Mr. *S. Miller* contra, on the point of parties, argued, that the Plaintiff was relieved by the thirty-second General Order of August 1841 (b), from making the co-obligors parties to the suit. The account prayed is merely ancillary to the principal relief.

The MASTER of the ROLLS held that the bill was defective for want of the parties pointed out, and he allowed the demurrer on that ground alone: but as the principal objection had failed, he gave no costs of the demurrer. (c)

(a) 2 *Ves.* jun. 391.

(b) *Ord. Can.* 174.

(c) See *Benson v. Haifield*,

5 *Beav.* 546.

Jan. 25, 24.  
 Feb. 1.

#### The ATTORNEY-GENERAL v. PARGETER.

A husbandry  
 lease of charity  
 lands for 200  
 years at a  
 fixed rent,  
 cannot, unless  
 there be some  
 special reason,  
 be supported in equity.

Such a lease of charity lands cannot be supported upon any custom of the country in which the lands are situate.

The purchaser of a charity lease takes with notice of the facts appearing thereon shewing its equitable invalidity.

It

It appeared that *Thomas Foley* had in his lifetime built a school for sixty boys. By his will, he devised the house and various real estates in fee to the persons named in his will, and gave to the same persons a sum of money to be expended in the purchase of other real estates, to be conveyed to them; and he directed the lands to be employed for the purposes of the charity. He afterwards in his will, speaking of his devisees, termed them "Feoffees."

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The testator died in 1677, and new trustees were afterwards appointed. On the 28th of *September* 1695, the trustees demised part of the charity lands to *William Parker* for 200 years, at a rent of 14*l.* 3*s.* The lease contained an exception of the mines and quarries, coal, ironstone mines and minerals, with liberty to search for and get the same, and also an exception of the hares and other game, with liberty for three of the trustees &c. to sport, to hawk upon the premises, and a covenant by the lessee to preserve the game. The lessee did not subject himself to any obligation to build or to expend any money, but he covenanted to pay the reserved rent, to keep the buildings and fences belonging to the premises in good and tenantable repair, to use upon the premises the hay, straw, and fodder, and the dung, soil, and compost arising thereon, and to manure the premises in a good and husbandly manner.

The Defendant stood in the situation of a purchaser of this lease.

Mr. *Kindersley* and Mr. *Spurrier* in support of the information. This is a purely husbandry lease for 200 years, at a small, inadequate and fixed rent; practically this is an alienation of the charity property, and ac-

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cording to the authorities this is a breach of trust, and the lease is in equity void.

The lease on the face of it shews that it was a demise of charity lands for too long a period, at a fixed rent, and it carries, on the face of it, notice of the breach of trust; the Defendant, therefore, cannot say that he is a purchaser for valuable consideration without notice.

Mr. *Pemberton*, Mr. *Turner*, and Mr. *Harwood, contra*, contended first, that this was not a husbandry lease, and that the reasoning did not apply; secondly, that the will was not the original instrument of the foundation of the charity, and if that instrument were produced by the trustees, it might shew that there was a power of granting such a lease. The will shewed that the school had been completed in 1670, and both the will and the inscription on the picture of the testator (which was produced in evidence), shewed that the trustees were "feoffees," and therefore implied that the property had been conveyed to them by some instrument other than the will. Thirdly, that the evidence shewed that the custom of the country warranted such a lease, and there were instances in which the testator himself had granted such leases, and lastly that when, at a great distance of time, the Attorney-General sought to set aside a lease as against a purchaser, he must shew inadequacy of consideration at the time it was granted, and notice in the purchaser. That here the Defendant was purchaser for valuable consideration and without notice. In *Attorney-General v. Backhouse* (a), such a lease was supported in favour of a purchaser, and Lord *Eldon* observed, "These parties must be understood at least to have notice that the lessors were trustees for a charity: but I

cannot

(a) 17 *Ves.* 283. 295.

cannot go the length that the purchasers had notice that this was a bad lease; that depending upon a number of circumstances dehors the lease."

**Mr. Kindersley** in reply.

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The following cases were cited, *Attorney-General v. Green* (a), *Attorney-General v. Owen* (b), *Attorney-General v. Griffith* (c), *Attorney-General v. Kerr* (d), *In re The Berkhamstead Free School* (e), *Attorney-General v. Hungerford* (g), *Attorney-General v. Cross* (h), *Attorney-General v. Warren* (i), *Attorney-General v. Backhouse*. (k)

*The MASTER of the ROLLS.*

Feb. 1.

This is an information and bill filed to set aside a lease dated the 28th of September 1695, whereby certain charity lands were demised to *William Parker* for 200 years, at the stationary rent of 14*l.* 3*s.*

It does not appear that any consideration, other than the rent, was paid or agreed to be paid for the lease. There was no surrender of any former lease; the lessee did not subject himself to any obligation to build or to expend any money, but he covenanted to pay the reserved rent, to keep the buildings and fences belonging to the premises in good and tenable repair, to use upon the premises the hay, straw, and fodder, and the dung, soil, and compost arising thereon, and to manure the premises in a good and husbandly manner.

I think

(a) 6 *Ves.* 452.

(h) 3 *Mer.* 524.

(b) 10 *Ves.* 555.

(i) 2 *Swan.* 291.; and see *At-*

(c) 13 *Ves.* 565.

*torney-General v. Brettingham,*

(d) 2 *Beav.* 420.

3 *Beav.* 91., and *Attorney-General*

(e) 2 *Ves.* & *B.* 134.

v. *The South Sea Company*, 4

(g) 2 *Cl. & Fin.* 557.; 8 *Bl.* *Beav.* 453.

(k) 17 *Ves.* p. 293.

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I think that this is a husbandry lease, and not the less so, because there is an exception in the grant, of the mines and quarries, coal, ironstone, mines and minerals, with liberty to search for and get the same; and also an exception of the hares, partridges, pheasants, and other beasts and birds of warren, with liberty for three of the trustees, their servants and followers, to hawk and hunt upon the premises, at their wills and pleasures, and a covenant by the lessee to preserve the game for the same persons.

This being a husbandry lease of charity lands granted for 200 years at a fixed rent, it cannot stand, unless there be some special reason to support it.

I am of opinion, that the length of the term is not justified or excused by the reservation of the mines, and the right to get coal and minerals.

It is argued, that there are in this case circumstances, to shew that the real foundation of the charity is not forthcoming:—that there must have been some deed of covenant:—and that if such deed of settlement were produced, it would or it might be thereby shewn, that there was authority to grant this long lease.

It does not appear to me that the facts of the case afford any foundation for the argument, that there was any deed or instrument other than the will, whereby the estate was vested in the trustees.

The testator, having built a school house in which sixty boys were placed, devised the house and various real estates to the persons named in his will in fee, and gave to the same persons a sum of money to be expended in the purchase of other real estates, to be conveyed

veyed to them in fee: he directed the lands to be employed for the purposes of the charity, and in afterwards speaking of the persons to whom he had made the devise, he calls them "feoffees," instead of "devisees" or "trustees," and from this it is argued, that it should be inferred that there must have been a feoffment besides the devise; but I own that it appears to me, from the context of the will, that in using the word "feoffees," the testator means only to designate, in one word, the several persons to whom he had devised the estate in fee. I cannot suppose that he made a devise of the lands to the same uses, to persons to whom he had previously conveyed the same lands by feoffment; and I do not think that the inscription on the picture adds any probability to the argument. It does not appear what was the date of the inscription, and I think that by "feoffees," was meant the persons, who, as trustees, were possessed of the fee or inheritance of the estate, and that the will of the founder was the instrument by which the estate was settled.

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In the lease in question, the devisees are described as trustees or feoffees, a description perhaps intended to reconcile their real character as trustees with the slightly erroneous description of them in the will, and on the testator's picture, if the inscription was existing at the date of the lease, which does not appear.

It is next argued, that this lease was granted according to the custom of the country, and according to the usual mode of letting, adopted and acted upon by the trustees themselves. It appears, indeed, that the trustees had granted some other leases of the same kind, and an attempt was made to prove the alleged custom of the country. I think that the attempt was unnecessary, for if any number of such leases had been proved, they could

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could not have established a custom which would have justified trustees in alienating the charity lands in this way, but the proof failed, and some leases for twenty-one years were produced.

It is lastly argued, that the Defendant's father was a purchaser of the estate for a valuable consideration, and that he was not bound by an equity to set aside the lease founded on extrinsic circumstances, but the purchaser must be held to have had notice of the lease which he purchased. (a) The equity of this case is not founded on extrinsic circumstances, but on the facts appearing on the lease itself, shewing it to be such, that if due consideration had been given to the subject, neither lessors nor lessee could have thought the lease beneficial to the charity, or any thing less than a breach of trust.

(a) See *Walter v. Maunde, Garland*, 4 Y. & Col. (Exr.) 394. 1 Jac. & W. 181. *Cosser v. Col- and Paterson v. Long, post.* *linge*, 3 Myl. & K. 283. *Pope v.*

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## GURDEN v. BADCOCK.

1841.

Nov. 5, 6. 16.

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Dec. 6, 7.

In 1812 the executors of a receiver applied to pass his accounts and pay in the balance, this was ordered, but payment was not made. In 1841 they were ordered to pay in the balance without interest, and it was held that they could not object the want of assets.

*A.* was appointed receiver, but the solicitor in the cause alone acted and paid over the rents to the tenant for life. An incumbrancer compelled the receiver to pay the same amount into Court, and after payment of his claim, there remained a surplus, which was paid to the tenant for life. Held, that *A.* could not, on petition, obtain repayment by the tenant for life or out of the estates.

UNDER the will of the testator, Mr. *Price* was tenant for life of an estate, subject to certain incumbrances thereon, and to an annuity of 100*l.* a year payable thereout to *Mary Sanders*.

In 1805, a bill was instituted by *Price* and another for the purpose of paying the charges and carrying the trusts of the will into execution.

In 1806, Mr. *Drayson* was appointed receiver of the estates, in the usual manner. The receiver was continued by the decree made in 1808, and he was ordered to keep down the incumbrances.

Mr. *Drayson*, the receiver, did not, however, in fact, act, but a Mr. *Kirby* who as trustee was a Defendant in the cause, and was also the solicitor of the Plaintiff and Defendants, received the rents, and took upon himself the management of the matters. Mr. *Drayson* died in 1809, and in 1812 his executors, by the direction and suggestion of *Kirby*, applied for and obtained leave to pass the receiver's accounts and to pay the balance into court. The Master found a sum of 992*l.* to be due from the receiver; this sum however was, in fact, in the hands of *Kirby*, and was never paid into court. The tenant for life was let into possession in 1809, and was directed to keep down the annuity and incumbrances.

The cause was heard on further directions in 1814, when certain declarations were made.

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The suit remained in a state of inactivity for some years, but in 1830 the conduct of the cause was taken from the Plaintiffs and given to the representatives of Mrs. *Sanders* the annuitant, to whom an arrear of annuity was due. They some years after, discovering that the receiver's balance had not been paid into court, presented a petition, praying that his surviving executor might pay into court the sum of 992*l.* and interest. The incumbrancers having priority over the life estate had not been paid off.

It was alleged that Mr. *Kirby* in his lifetime, had paid over a portion of the 992*l.* to Mr. *Price*, the tenant for life, and that after his decease his executor had, in 1836, paid over 437*l.* 19*s.*, the balance, to Mr. *Lovell*, Mr. *Price's* solicitor in the cause, who gave the following receipt for the same.

“ In Chancery.

July 26. 1836.

“ *Gurden v. Badcock and Others.*

“ Received of Mr. *Henry Elliott*, surviving executor of the will of the late *J. M. Kirby*, Esq., the sum of 437*l.* 19*s.* for money retained by him out of the rents resulting from the *Westbury* and *Mixbury* estates, towards the costs of his bill which have been otherwise discharged.

“ For Mr. *B. Price*.

“ *John Lovell.*

Mr. *Pemberton* and Mr. *Lloyd*, in support of the petition, asked, that the executor of the receiver might be ordered to pay the fund into court with 5 per cent. interest.

Mr. *Kindersley* and Mr. *Dixon*, for Mr. *Price*, the tenant for life.

Mr.

Mr. Russell and *Mr. Romilly*, for *Mr. Deacon*, the executor of the receiver, contended that there was no case for charging the executor personally; and that he had no assets in hand to discharge the claim. That the *laches* of the parties had been such, as to disentitle them to the assistance of the Court. That the balance had never, in fact, come to the hands of the receiver, and by arrangement between the parties it had been paid by *Kirby* to the tenant for life. That the relief now asked could not be granted on petition.

Mr. Ellison and *Mr. Smythe*, for other parties.

Mr. Pemberton, in reply.

The Master of the Rolls said that the executors, having three years after their testator's death, and with perfect knowledge of the state of his assets and the circumstances of the case, presented their petition for passing the accounts and payment of the balance, could not now be heard to say that they had no assets.

That as to the delay, the parties had existing duties to perform, and had had the matter brought to their attention both in 1828, and again in 1836, when they entered into arrangements not with the parties having the first charges, but with the tenant for life. That as there were existing claims, prior to the estate of the tenant for life, towards the liquidation of which this fund was liable, his impression was that the money must be paid into court, but whether or not with interest required consideration. His Lordship said he would read the documents before deciding.

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The MASTER of the Rolls said, that the respondent must pay into court the amount of principal money, and the costs of the application; but considering the length of time which had elapsed, and the laches of the parties, he ought not to direct the payment of interest: that the case was an unfortunate one, the parties having implicitly relied on the solicitor, but every thing tended to shew the responsibility of the representative of the receiver.

On the 16th of December 1841, the executor of the receiver paid into court the amount as directed, and which sum, together with another sum in court, was in July 1842 applied in payment of the incumbrances and costs, and the residue of the fund, after such payment, was directed to be paid to *Pugh*, the assignee of *Price*, the tenant for life. The claims of the parties having preference to the tenant for life, thus became satisfied, and they gave up possession of the estates.

The executor of the receiver having first learned of this order in July 1842, now presented a petition praying that an account might be taken of the monies paid by *Kirby*, the agent of the receiver, and by the executors of the receiver to the tenant for life; and that the tenant for life might repay the amount to the petitioner, and that it might be declared that in default the rents of the estate might be applied in the discharge thereof.

The affidavit of *Price* stated, that he had never received any accounts from *Kirby*. That in 1836, when negotiations were pending as to the payment of the balance by the executor of *Kirby* to him, *Price*, he had insisted on the representatives of *Kirby* paying interest on the balance. That *Lovell*, in 1837, rendered him

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an account, in which he was credited with the 437*l.* 19*s.* received from the executor of *Kirby*, and which was the first time he was acquainted with the arrangement made. That no account had ever been received by him, *Price*, and that the 437*l.* 19*s.* had been applied in liquidating the balance of *Lovell's* account against *Price*.

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Mr. *Pemberton* and Mr. *Romilly*, in support of the petition. The ground on which the 992*l.* was ordered to be paid into Court, on the former occasion, was, that it was wanted for the incumbrancers. It has turned out that it was not required for that purpose. If the Court had been aware of the state of the funds, no order would have been made for payment by the executor of the Receiver. The surplus of the fund paid in, after paying the incumbrancers, belonged, in equity, to the representatives of the Receiver, and if the fund had remained in Court, it would, on application, have been repaid to the executor of the Receiver. *Price* and his incumbrancer have obtained it out of Court, behind the back of the parties interested, so that *Price* has, in effect, twice received payment of the same sum from the Receiver. The jurisdiction of the Court cannot be destroyed by the irregular payment out of Court, besides which the nature of the suit is such, that the Court has still jurisdiction and control over the rents of the property, and, by their proper application, the petitioner may be indemnified.

Mr. *Kindersley* and Mr. *Lloyd*, for *Price*. The Court has no jurisdiction, upon petition, to fix a lien on the real estate of the tenant for life, at the instance of a stranger to the cause.

Before the petitioner can have the relief he asks, the accounts must be taken as between *Price* and the

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estate of *Kirby*, and all the equities between them determined.

Both the Receiver and *Kirby* who represents him, ought also to be charged with interest on their balances, and the poundage ought to be disallowed. All this involves a series of proceedings which cannot be taken on petition.

If the petitioner had wished to establish any equity on the fund, he should have obtained a stop order.

The Master of the Rolls.

If this were the simple case supposed, there would be no great difficulty in dealing with it. If the Receiver had paid to the tenant for life, money which he ought to have paid into Court for the benefit of a creditor, and at a subsequent period had been compelled by the creditor to pay the same amount into Court, and if, after full payment to the creditor, a surplus remained in Court which the tenant for life applied to have paid to him, the Court would have no difficulty in stopping payment, until the claim of the Receiver had been investigated; and no difficulty in exercising its jurisdiction in ordering the remaining fund in Court to be paid back to the Receiver.

That is not this case. Here there has been an irregularity from the beginning. In *July 1806* the Receiver was appointed: it seems he never acted as such, except for the purpose of rendering the accounts under the dictation of Mr. *Kirby*, who received the rents of the estate. He, it seems, was solicitor for the next friend of the infant Plaintiff, and was executor and trustee of the will under which the estate was to be administered, and

and in that character was a party to the cause. In 1807, an account was rendered down to *Michaelmas*. In 1809, at *Michaelmas*, two years' further accounts were to be rendered, and shortly after that time the Receiver died.

In 1812, the executors of the Receiver, again at the dictation or suggestion of *Kirby*, applied for leave to pass the account, and the accounts were passed on the 6th and 7th of *November* 1812, and 992*l.* was found due on this account. This amount, though appearing due from the Receiver, was, in fact, in the hands of *Kirby*, and continued in his hands for very many years. In 1836 an account seems to have been settled; it appears, though the evidence is not very distinct, that there had been several previous payments to *Price*, the tenant for life, and in *July* 1836, upon the settlement of the account, the balance was paid by the representative of *Kirby* to *Lovell*, the solicitor of *Price*.

Supposing no account to have been settled, what would be the right of the Receiver who has been thus called on to pay the money into Court? He claims the benefit of the payments made to *Price* by *Kirby*. Can he have them without subjecting himself to all the liabilities of *Kirby* to *Price*? It appears to me that he cannot. The Receiver who appointed *Kirby* to act as his agent, claims the benefit of the payments made by *Kirby* to *Price*. In order to have the benefit, he must place himself in the situation of *Kirby*, and if *Kirby* was liable to *Price*, I apprehend, that subject to those liabilities only, can the Receiver work out his claim. If no account was settled, what was the relation between *Kirby* and *Price*? *Drayson* was appointed Receiver, but *Kirby* assumed to act as such; and I am inclined to think

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that as between *Price* and *Kirby*, *Kirby* was subject to all the liability to which the Receiver was subject. If there was no account settled, no settlement between the parties, what were the liabilities of *Kirby* or his estate? In 1836, was he not liable to pay interest for all that time, and liable to be deprived of his poundage?

On the other hand, suppose the account was settled as between *Kirby* and *Price*, can the present petitioner, the Receiver, claim the benefit of the payments made by *Kirby* to *Price*, without opening the account; and can a right to open the account be established in any such a proceeding as this? It is possible that the account may be opened, but I cannot, on a petition of this description, consider it to be opened.

This case comes on upon petition, after an order for the distribution of the funds in Court, not asking that an anticipated payment to the tenant for life may be stayed, or that the sum improperly paid may be brought back; but it asks a general account of what was paid, and seeks the benefit of a lien on the estate, for what shall appear due on the account. I do not think that the relief can be granted on petition in a case like this. There are many cases where liberty is given to apply, in which an application may be made by persons not parties to the record, but they are persons having a direct interest in the execution of the decree. There is nothing in this decree that gives an interest to the petitioner, and what is asked is not the result of any decree or direction in the cause, but is founded on some thing not appearing at all in the record. If I considered it a case in which money had been got out of Court by fraud or improper concealment, it would be subject to other considerations.

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It appears that the accounts between *Kirby* and *Price* have been such, that you must overturn what has taken place between them before you can get at the account. Under these circumstances, I cannot grant the relief which is sought. There is a grievous hardship if what is alleged is true, that *Price* had some of the money in his hands, which the Receiver was ordered to pay into Court.

I do not determine that the petitioner has not the right he claims; all I can say is, that he has not such a right as he can make available upon petition.

The petition must be dismissed without costs, and without prejudice to any further proceedings.

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## DARTHEZ v. CLEMENS.

Dec. 22.

THE Plaintiffs Messrs. *Darthez* and Co. were merchants residing in *London*, and the Defendant *Clemens* was a merchant at *Malaga*. The Defendant and one *Ritchie* of *New York*, were the Plaintiffs' correspondents in trade, and had made consignments of goods and merchandise to them, and the Plaintiffs, from time to time, advanced money on the credit of the consignments. The Defendant having commenced an action at law against the Plaintiffs for the recovery of

Where a bill for an account which relies on certain items as the ground for transferring the matter from the jurisdiction of a court of law to that of equity, also contains a general vague charge of

1705*l.*,

there being voluminous and intricate accounts between the parties; then, if the Plaintiff fails in supporting his equity upon the particular items, he cannot maintain the bill against a demurrer upon the latter vague charges.

Upon a bill for a general account between *A.* and *B.*, a question arose as to three items, whether they ought to be charged against *A.* or against *C.*, with whom *A.* and *B.* had had some mutual dealings. Held, that *C.* was not a necessary party to the suit.

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1705*l.*, the alleged amount of the balance due from the Plaintiffs to the Defendant, the Plaintiffs filed this bill, to have between them the accounts taken, and to restrain the proceedings at law.

The greatest portion of the allegations of the bill related to three particular sums of 1000*l.*, 1000*l.*, and 700*l.*, which the bill insisted ought to be brought into the account between the Plaintiffs and the Defendant, and for which it alleged credit ought to be given by the Defendant, by means of which the balance would be turned in favour of the Plaintiffs. It stated, as the foundation for this, certain transactions between the three parties, in the course of which these three sums had become due; and it appeared in dispute between the Plaintiffs and the Defendant, whether from the nature of the dealings and the effect of the correspondence between the three parties, these sums ought to be charged in account against the Defendant, or against *Ritchie* alone, who was alleged to be insolvent.

After stating these matters, the bill, as the foundation for a general account, stated as follows: "That various other dealings and transactions were, from time to time had, and did take place by and between the Plaintiffs and the said Defendant hereto, in the way of their respective trades or businesses as merchants, and divers remittances and consignments of monies, bills of exchange, goods, and merchandise were, from time to time, made, by and from the said Defendant to the Plaintiffs; and divers sums of money were, from time to time, paid by the Plaintiffs by the direction, and to and for the use and on account, of the said Defendant hereto, exclusive of the particular sums hereinbefore in that behalf mentioned, and divers goods and merchandise were, from time to time, shipped and sent by the

the Plaintiffs by the direction and to and for the use of the said Defendant hereto ; and the monies and goods so remitted and paid, on each side, by and between the Plaintiffs and the said Defendant hereto, amount to a very large and considerable sum in the whole ; and a considerable balance or sum of money hath become and is now justly due and owing from the said Defendant hereto to the Plaintiffs on the foot of the said account ; and by the means aforesaid, an account hath arisen, and is still open, subsisting and unsettled between the said Defendant and the Plaintiffs, in respect of the matters aforesaid.

“ That the said accounts between the Plaintiffs and the said Defendant, and more especially having regard to the transactions between the said Defendant hereto, and the said *John Ritchie* herein appearing, are of a very voluminous nature, and consist of several hundreds of items on both sides of the account, including a daily interest account ; and such account between the Plaintiffs and the said Defendant could not, without manifest inconvenience and injustice to the Plaintiffs, be taken in a court of common law, and such account cannot, in fact, be justly or properly taken except in a court of equity, where such matters are properly cognizable and relievable.”

The bill charged that a balance was due to the Plaintiffs ; it required the Defendant to set forth all the dealings and transactions, and prayed a general account of all the dealings and transactions between the Plaintiffs and the Defendant.

To this bill *Clemens* alone was made a Defendant, and he demurred to this bill, first, for want of equity, and, secondly, for want of parties.

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Mr. *Kindersley* and Mr. *Colvile*, in support of the demurrer, contended, that it appeared from the statement in the bill (which they commented on), that the Plaintiffs were not entitled to set off the three sums in question, which alone formed the subject of dispute between the parties ; and that a court of law was perfectly competent to decide such a question. [Mr. *Pemberton*. We do not rely on these three items, but insist on the Plaintiffs' right to the general account.] The Plaintiffs then must shew, on the face of their bill, that the account between them and the Defendant can only be taken in this Court, otherwise they will not be allowed to withdraw the case from the court of law which already has jurisdiction. Mere general allegations of the intricacy of the accounts are insufficient for the purpose : they will be disregarded by this Court, and will be considered as struck out. *Dinwiddie v. Bailey* (a), *Frietas v. Dos Santos* (b), *King v. Rossett* (c), *Bowles v. Orr.* (d)

Secondly, *Ritchie* is a necessary party to this suit, for if these three items are to be brought into the account between the Plaintiffs and Defendant, the balance between *Ritchie* and the Defendant will be altered. *Ritchie* has an interest in the matters ; the Plaintiffs, asking to have the benefit of the set-off as against the Defendant, have improperly omitted making *Ritchie*, the person principally interested, a party to the suit.

Mr. *Pemberton* and Mr. *Rogers* were not heard by

The MASTER of the ROLLS, who said —

I do not think that this demurrer can be sustained. The Plaintiffs say they are entitled to a general account,

and

(a) 6 *Yel.* 136.

(c) 2 *You. & Jer.* 33.

(b) 1 *You. & Jer.* 574.

(d) 1 *You. & Col.* 464.

and to have credit for the three particular sums ; but they concede, for the purpose of this demurrer, that they are not entitled to relief in respect of the three sums, and rest on their right to the general account.

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The Defendant states, what I believe is perfectly true in point of law, that if there be a bill for an account in respect of particular items, or any number of particular items, and the Plaintiff fails in sustaining the demand upon those particular items, and the bill happens to contain a general vague charge that there are voluminous and intricate accounts between the parties, and which charge is inserted merely as a pretext for the purpose of bringing the case within the jurisdiction of a court of equity, the Court, in so vague and uncertain a case, will disregard that general allegation, will consider it as struck out of the bill, and not allow it to protect the bill against a demurrer for want of equity. That is the utmost extent to which the cases have gone.

It therefore comes to this, does this bill contain such vague and general statements, statements put in merely as a pretext for transferring the jurisdiction from the court of law to this Court? If the account can be fairly taken in a Court of common law, this Court will not interfere, even in the case of merchants' accounts consisting of mutual dealings ; but in this case I am persuaded not only that the accounts between these parties could not be advantageously taken in a court of law, but that they could not be taken at all there. Every body knows how an action upon such an account would necessarily end ; it would end in the account being taken in this Court, or by a reference.

It is said that the bill is defective for want of parties. If the three items should ever come into question, the Plaintiffs

1842.
 DARTHEZ
 v.
 CLEMENS.

Plaintiffs must make out their case by proof; I do not follow that *Ritchie* is a necessary party to taking of the accounts between the Plaintiffs and Defendant. I think also that the demurrer can be sustained on this ground.

Demurrer over-

1843.
 Jan. 24. 27.

GARDNER v. JAMES.

Bequest of residue, in trust, after payment of an annuity of 50*l.* to *A.* for life, to apply the residue of the interest towards the maintenance of the children of *B.* until twenty-one, and in case of the death of *A.* during their minority, to apply the whole or so much as was necessary in the same way, and after the death of *A.*, when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of *B.* living at the death of *A.* The fund was not sufficient to provide for the annuity. Held, that the gift to the children was not confined to those living at the death of the testatrix.

should have attained such age or respective ages of twenty-one years as aforesaid, then, upon trust, to transfer such trust money to such child, if there should be only one, or if there should be more than one, to all such children, share and share alike; but if there should be no such child of *Henry Holland Gardner* living at the death of the said *Susannah Brunton*, or in case of the death of such child or children before they should attain the said age of twenty-one years as aforesaid, then, after the death of *Susannah Brunton*, the testator gave and bequeathed the whole of the said trust money, and all accumulations thereof, to *John James*, his executors, administrators, and assigns absolutely."

A bill was, in 1828, filed by the children then *in esse* of *Henry Holland Gardner*, in which the accounts were taken, and the residue was found to consist of 2700*l.* 3 per cents.; of this sum 1677*l.* 18*s.* 4*d.* was set apart to answer the annuity of 50*l.*, and the dividends on the remainder were ordered to be applied towards the maintenance of the Plaintiffs in the suit, who were infants.

Henry Holland Gardner had afterwards four children born, who claimed to be interested in the residue. The Plaintiffs in the first suit then instituted the present suit, praying a declaration that the children living at the death of the testator were alone entitled under the will.

Mr. Hallett for the Plaintiffs.

Mr. Blower, contra.

Mr. Hallett, in reply.

The

1843.
GARDNER
v.
JAMES.

1843.
 GARDNER
 v.
 JAMES.

The following authorities were referred to. *Spræckling v. Ranier* (a), *Ringrose v. Bramham* (b), *Hill v. Chapman* (c), *Davidson v. Dallas* (d), *Butler v. Lowe* (e), *Defflis v. Goldschmidt* (g), *Balm v. Balm* (h), *Scot v. The Earl of Scarborough* (i), *Crone v. Odell* (k), *Wheatbread v. Lord St. John* (l), *Andrews v Partington* (m).

Jan. 27.

The Master of the Rolls said, he was of opinion that the gift to the children was not confined to those living at the death of the testator, but that after-born children were let in, but he could make no further declaration at the present time.

(a) 1 <i>Dick.</i> 344.	(h) 3 <i>Sim.</i> 492.
(b) 2 <i>Car.</i> 384.	(i) 1 <i>Beav.</i> 154.
(c) 1 <i>Ves. jun.</i> 405.	(k) 1 <i>Ball. & B.</i> 449.
(d) 14 <i>Ves.</i> 576.	(l) 10 <i>Ves.</i> 152.
(e) 10 <i>Sim.</i> 517.	(m) 3 <i>Bro. C. C.</i> 402.
(g) 1 <i>Mer.</i> 417.	

1843.

HOOPER v. PAVER.

Feb. 11.

HIE Plaintiffs in this cause having described themselves as resident abroad, the Defendants obtained, as of course, at the Rolls, an order that the Plaintiff should give security for costs.

The cause was attached to the Vice-Chancellor's Court.

A motion was now made to discharge the order for regularity.

Mr. *Smythe* in support of the motion. The bill in this case is filed by the children, for the administration of a fund to which they are entitled under the settlement of their parents; and it appears that the Defendants have a fund of 6000*l.* in hand which belongs to the Plaintiffs. If Defendants have in their hands a fund belonging to the Plaintiff, sufficient to indemnify them against the costs of the suit, they have no right to demand a further security for those costs.

The order having been made here, the application for discharge must necessarily be made to the Master of the Rolls, as the Vice-Chancellor has no jurisdiction to alter or discharge the orders of the Master of the Rolls. *Whitehouse v. Hickman (a)* *Earl of Glengall v. ~~Lord~~ (b)*

Mr. *Pemberton* and Mr. *Rolt* were not called on by

The

(a) 1 *S. & St.* 104.

(b) 1 *Hare*, 624.

In a Vice-Chancellor's cause, the Plaintiffs described themselves as resident abroad. The Defendants obtained *ex parte* at the Rolls, an order for security for costs. An application to the Master of the Rolls to discharge it, on the ground that the Defendants had in their hands funds belonging to the Plaintiffs sufficient to indemnify them, was refused, because there was no irregularity in the order, and the cause being attached to the Vice-Chancellor's Court, the Master of the Rolls could not enter into the merits.

1848.

HOOPER
v.
PAVER.

The Master of the Rolls, who said, that the Plaintiffs having described themselves as resident abroad, was quite of course to obtain an order for security for costs. The order complained of was therefore perfectly regular, and if the Plaintiffs sought to discharge it on other grounds they must apply to another jurisdiction.

The motion must be refused with costs.

NOTE.— See 9th Order of May 1837, *Ord. Can.* 114; 6th Order of May 1839, *Ord. Can.* 137. *Robinson v. Milner*, 5 *Beav.* 49— and *St. Victor v. Devereux*, post.

Feb. 11.

PINNER v. KNIGHTS.

A bill being filed without the written authority of one of several co-Plaintiffs, and the evidence being unsatisfactory as to the retainer, his name was struck out as co-Plaintiff with costs to be paid by the solicitor.

Where a solicitor files a bill without a written authority, the *onus* of proof is cast on him. If there be any doubt on the matter, the Court will hold him liable.

Mr. G., a solicitor, had filed this bill in the name of Mr. Thomas Knights and others. It appeared, however, that he had had no communication with Thomas Knights, and had received no authority from him personally to institute the suit, but had acted by the directions of Mr. Knights' brothers, who said that they had communicated with him, and that he had authorized the step.

It was now moved, that Mr. Knights' name might be struck out as co-plaintiff, with costs to be paid by Mr. G. the solicitor.

Affidavits were filed in support and in opposition to the motion by Mr. T. Knights and by his brothers, but which

which it is not necessary to state further than this, that they appeared to the court to leave the fact of the Plaintiff's authority to his brothers, in considerable doubt.

1843.
PINNER
v.
KNIGHTS.

Mr. George Turner, in support of the motion, asked for a similar order to that made in the cause of *Hood v. Phillips.* (a)

Mr. Pemberton and Mr. Dixon, contra.

The Master of the Rolls.

I have of late had several of these cases before me (b), which I exceedingly regret.

Nothing surprises me more than that solicitors should so frequently take upon themselves to file bills in the names of persons who have not given them authority in writing. The general rule of the Court is, that a solicitor should obtain a written authority from his client; I have often had occasion to observe, that the interest of the client does, very often, induce a solicitor to file a bill before he has had an opportunity of obtaining an authority in writing; I cannot consider a solicitor is to blame in cases of that kind, but, as I have said before, he acts most imprudently if he does not take the very first opportunity to obtain the sanction of the client for what he has done. The law of the Court is perfectly clear, that if the authority afterwards comes into question, ay or no, whether there is an authority from the client or not, and there is no writing, it will go against the solicitor unless he can prove distinct authority or implied authority by acquiescence or some other means.

Now,

(a) See next case.

pin, 2 Beav. 405. *Allen v. Bone*,

(b) *Tatbernor v. Tatbernor*, 4 Beav. 493.

² *Keen*, 679. *Wiggins v. Pep-*

1843.

PINNER

v.

KNIGHTS.

Now, in this case, there does not appear to have been any personal communication between Mr. G. and Mr. *Thomas Knights*; Mr. G. trusted to the representations of the brothers, who said they had communicated with Mr. *Thomas Knights*, and that he had authorized them to instruct him. The consequence is, that Mr. G. must prove satisfactorily, that the brothers were empowered to authorize him. When we come to examine the evidence, it is impossible for the Court to make out on which side the truth lies, and upon that ground, and upon that ground alone, I am under the necessity of saying that the solicitor, on whom the burthen of proof is cast, has not, in the midst of this conflicting and contradictory evidence, made out his case.

The authority not having been proved, this motion must be granted.

HOOD v. PHILLIPS.

1842.
July 21, 22.

A bill filed without the authority of the Plaintiff, was dismissed with costs, and the Plaintiff was taken under an attachment for non-payment of costs. The Court, on motion, ordered the solicitor to

indemnify *A.*, but refused to release *A.* as against the claim of the Defendants. Held also, that *A.* was not, on such an application, to be deprived of his right against the solicitor to damages for his imprisonment.

In this proceeding Mr. *Phillips*, who acted as solicitor for the Plaintiffs, took his instructions entirely from *Hood*, and, as it appeared, never communicated with *Sanders*, or obtained from him any authority for instituting or prosecuting the suit.

Upon

Upon the dismissal of the bill, a subpoena for costs issued; the Plaintiff *Sanders* was taken under an attachment for their non-payment, and was lodged in prison.

1842.
Hood
v.
Phillips.

Mr. G. Turner now moved that the name of *Sanders* and *Mary* his wife might be struck out of the record of the Plaintiff's bill in this cause: — that the Plaintiff might be discharged out of custody as to his contempt for not paying 6*3l.* 4*s.* costs to the Defendants, and that *Phillips* might be ordered to pay the costs of this application, together with the costs which *Sanders* had become liable to pay, by reason of his having been made a party to this suit.

Mr. Pemberton and Mr. Freeling for the Defendants.

Mr. Kindersley and Mr. Lewis for Phillips.

v- *Wilson v. Wilson (a), Wade v. Stanley (b), Tabbernор Tabbernор (c),* were cited. (d)

The Master of the Rolls.

Before filing a bill, it is the duty of a solicitor to obtain distinct authority; the general rule is that he ought to have it in writing, but though this is the proper course, still it is not necessary, if it be proved that the Plaintiff has afterwards acquiesced in the proceedings, and that the circumstances are such that the Court can infer an authority. Whenever the question arises, whether the authority

(a) 1 Jac. & W. 457. pin, 2 Beav. 403.; *Allen v. Bone*,

(6) *Ibid.* 674.

C) 2 Keen. 679.

(d) And see *Wiggins v. Pep-*

pin, 2 Beav. 403.; *Allen v. Bone*,

4 *Brev. 493: Hall v. Bennett.*

2 Sim. & St. 78.

1842.

Hood

v.
PHILLIPS.

authority has been given or not, and it becomes the subject of doubt and argument, the *onus* of proving it lies on the solicitor. In this case there is not the least circumstance from which I can infer that any authority was given by *Sanders*: no express authority is proved; no communication with him, and no circumstance from which my mind can be led to the conclusion that any authority was at any time given. Then it is said that the subject of this suit was one proper for the consideration of a court of equity; I am informed, that such was the opinion of a gentleman of the bar, and that, in consequence of that opinion, this suit was instituted. Authority seems to have been given by one of the Plaintiffs, and, without doubt, the solicitor thought that the best mode of conducting the suit was to make all these parties Co-plaintiffs. It was very unfortunate that he did not recollect that with the authority of one he could not proceed in the name of both. In consequence of his having proceeded without that authority, he has become subject to the consequences which follow on this present motion.

It is said, that not only did *Sanders* not authorise the suit, but that he expressly dissented from it, not indeed to *Phillips*, but to the Co-plaintiff. Having dissented and hearing nothing of the matter, he was not further informed of it till the bill was dismissed with costs; then he was told that he had not only lost the 500*l.* for which he refused to sue, but also the costs incurred in consequence of the suit. I should have been glad to have heard that the solicitor had made some communication to *Sanders*, saying, "I have made a mistake and will protect you." Instead of that, it does not appear that he took any step whatever. The consequence, as might have been expected, was, that a *subpœna* for costs followed, and shortly after an attachment issued, under which

which *Sanders* was lodged in gaol, where he now remains, for non-payment of the costs to which he was subjected by *Phillips*, who thinks proper to contend that he is not bound to indemnify him at all. It is clear, however, that he has a right to be relieved from these costs at the expense of *Phillips*.

1842.

HOOD

v.

PHILLIPS.

I am afraid that the forms and rules of this Court do not enable me to exonerate him from the claims of the Defendants. It seems to have been considered so necessary that the declared rights of parties in a cause should be preserved, that similar claims of a party to the cause has, upon different occasions, been made effectual; and, notwithstanding this unfortunate person has been brought into his present situation without any authority given by himself, I fear I cannot relieve him from the demands of the Defendant, except by arrangement.

I have no doubt whatever, that he ought to be exonerated by *Phillips* from any demand, and the order to be made ought to be like that in *Wade v. Stanley*. (a) I cannot but hope that he will immediately take proceedings not only to release the Plaintiff from his present situation, but also from the further imprisonment which is impending over him, if the costs due from him to other parties are not paid.

It is asked, that I should make it a condition for giving relief, that the Plaintiff should be precluded from demanding any damages. I think that no authority can be produced to this effect. If there were, I would follow it; if not, I am not disposed to make a precedent. The only thing that can be done on the present application is, to exonerate the unfortunate man

at

(a) 1 J. & W. 674.

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1842.

HOOD

v.

PHILLIPS.

at the expense of *Phillips*, and by these means to exempt him from future imprisonment.

I cannot give him compensation for having been taken away from work and kept in prison, the effect of which may be his entire ruin. Such a state of things as is here brought about cannot be contemplated without the greatest regret.

The delay is not such as to deprive him of any right whatever.

NOTE.—By consent of the Defendants, the Plaintiff was discharged out of custody. Reg. Lib. 1840. A. fol. 1055.

1843.
Feb. 17.

PRICE v. LOCKLEY.

Bequest to *A.* for life, and after her decease to the testator's "four children, the survivor or survivors of them equally, or to their heirs lawfully begotten." One of the four children died in the life of *A.* Held, that his children took one fourth by way of substitution.

THE testator, by his will dated in 1805, after giving certain legacies, proceeded as follows: "all the residue and remainder of my money, and book debts, after payment of my just debts and funeral expenses, I will and order that the same shall be collected and placed in the public funds, for the use and behoof of my said wife and two said children *Eliza* and *Joseph*, during the term of my said wife's natural life, or so long as she shall remain my widow; and at the decease of my said wife, I give and bequeath the same to my said four children, the survivor or survivors of them, equally share and share alike, or to their heirs lawfully begotten. All the rest of my personal estate and effects of what nature or kind soever, I likewise give and bequeath to my said wife

wife during the term of her natural life, or so long as she shall remain my widow; and after her decease or second marriage, in either case, I will and direct that the same shall be disposed of by sale, and money equally divided among my said four children or the survivor of them or their heirs as aforesaid. I likewise order that the sum of 30*l.* hereinbefore mentioned for placing my son *Joseph* apprentice shall be deducted from his share at the decease of my said wife."

The testator died in 1805.

The testator's son *Joseph*, afterwards assigned his share to *Oliver James*, and he died in 1837, leaving five children. The testator's widow afterwards died in 1841.

The contest in this suit was whether *Oliver James*, or the five children of *Joseph*, was entitled to the one-fourth.

Mr. *Rogers*, for the Plaintiff.

Mr. *Koe*, for *Oliver James*, contended that *Joseph Price*, upon surviving the testator, took a vested interest in one-fourth of the residue, and that it had passed under his assignment.

Mr. *T. Parker*, for the children of *Joseph*, contended that the true construction of the will was this: that, if the testator's four children survived the tenant for life, they would have taken absolutely between them, and that, on the death of any of such four children in the lifetime of the widow without children, the survivors would have taken, but if they left children, such children would take the share of their parent by substitution. That *Joseph*, therefore, had no interest which he could pass to *Oliver James*.

1843.

PRICE
v.
LOCKLEY.

1843.



PRICE

v.

LOCKLEY.

Mr. Parker, junior, for the administratrix of Jas
Price.

Mr. Stinton, for other parties.

Mr. Koe, in reply.

The following cases were cited ; *Gittings v. M'L
mott* (a), *Walker v. Main* (b), *Cripps v. Wolcott*
Hervey v. McLaughlin (d), *Pope v. Whitcombe.* (e)

The Master of the Rolls was of opinion that, in
event which had happened, the children of *Joseph* to
one-fourth by way of substitution.

(a) 2 *Myl. & K.* 69.

(d) 1 *Price*, 264.

(b) 1 *Jac. & W.* 1.

(e) 5 *Russ.* 124.

(c) 4 *Mad.* 11.

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NOTE.—See *Pearson v. Stephen*, 5 *B&C* 203., and 2 *Dow*
328.

1843.

BEARE v. PRIOR. (a)

March 9.

ON the marriage of the Defendant *Henry Prior* in 1819, an indenture was executed, whereby, after reciting the intended marriage, and that *Prater* had agreed to lend *Prior* a sum of 1000*l.*, *Prior* covenanted to surrender certain copyholds to *Prater*, upon trust to apply the rents in payment, in the first instance, of the interest on the sum of 1000*l.* and then to apply the surplus of the rents in reduction of the principal sum of 1000*l.* till *February* 1829; and then, upon trust to sell and pay off the residue (if any) of the debt due on the mortgage, and invest the remainder of the proceeds in trust for the wife for life for her separate use, with remainder for the benefit of the issue of the marriage.

The rents were more than sufficient to pay the interest. *Prater* was, in 1819, admitted to the copyholds.

On the 27th of *February* 1829 a memorandum was indorsed on the indenture of 1819, and signed by *Henry Prior*, stating that it was agreed that the sum of 1000*l.* should continue upon mortgage for ten years longer.

Prater died, and, in 1840, his representatives filed this bill against Mr. and Mrs. *Prior* and their children, alleging that the whole sum of 1000*l.* was still due with an arrear of interest, and praying for an account and for a sale of the mortgaged hereditaments, and that the surplus might be invested upon the trusts of the indenture of *February* 1819.

The

(a) *Ex relatione.*

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An estate was conveyed by *A.* to *B.*, upon trust, for ten years, to apply the rents in payment to *B.* of the interest and capital of 1000*l.* lent by *B.* to *A.*, and then to sell, pay off the residue of the 1000*l.*, and hold the remainder in trust for the wife and children of *A.* The rents exceeded the interest. *B.* permitted *A.* to retain possession, and the interest was not applied as directed. Upon a bill by *B.* against *A.* and his wife and children for a sale:—Held, that *B.* could not, until he took possession, be made liable for what, without his wilful default, he might have received, except upon a cross bill raising that question.

1843.

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 BEARE  
 v.  
 PRIOR.

The Defendant *Prior* alleged, by his answer, that he had continued to receive the rents of the mortgaged hereditaments from 1819 until *April 1840*, when the representatives of *Prater* took possession; that, by the end of 1826, a sum of 300*l.* part of the 1000*l.* had been paid off out of the surplus rents, but that in 1829 *Prater* returned that sum to *Prior*, upon an agreement made between them, and expressed in the memorandum of 1829, that the whole 1000*l.* should continue to be secured upon the mortgaged hereditaments.

Mr. *Bacon* appeared for the Plaintiffs.

Mr. *Twells*, for the Defendants, contended that *Prater*, by accepting the trusts of the deed of *February 1819*, had become bound to receive the rents of the hereditaments, and apply them in reduction of the 1000*l.*, and that if he had pursued that course, the whole, or nearly the whole, of the debt would now have been paid off; and that, as the omission of *Prater* to do this amounted to a breach of trust, his representatives were not entitled to have the accounts taken in a more favourable manner than if such a breach of trust had never been committed. He therefore insisted that the Plaintiffs ought to account not only for what they or *Prater* had actually received, but also for that which without his or their wilful default might have been received.

The MASTER of the ROLLS said that from the time when the representatives entered into possession, they must account, in the usual manner, as mortgagees in possession, for the rents and profits which they had received, or which, without their wilful default, they might have received, but that the court could not make the Plaintiffs responsible for the rents which might have been received by *Prater* while he was not in possession  
 of

of the mortgaged estates, unless upon a cross bill to have the benefit of the trusts of the indenture of *February 1819*. That, as the case now stood, the Plaintiffs could only be made to account for what they had actually received prior to their taking possession in 1840, and for what might have been received by them since that period.

1843.  
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BEARE
v.
PRIOR.

RICHARDSON *v.* HORTON.

March 10. 15.
17.

ON the 8th of *May 1810*, Sir *Watts Horton* and *Thomas Horton* executed a joint bond for *6000L*. to **Messrs. Griffen and Leathes**, subject to a condition for making the same void, if they, their heirs, executors, or administrators, or any of them should pay **Messrs. Griffen and Leathes** the sum of *3000L* and interest on the 6th of *January 1811*.

A. and *B.* were obligors in a joint bond: *A.*, who was alleged to be the principal debtor, died. Held, that his assets were not in equity liable upon the bond, but that the liability survived to *B.*

It was said by the Defendants, that *Thomas Horton* was only surety for *Sir Watts*, but this did not appear by the bond.

Sir Watts Horton died in *November 1811*, leaving his co-obligor *Thomas Horton* surviving him.

By the decree made in *January 1832*, the Master was directed to take an account of the debts of *Sir Watts Horton*. By a separate report, dated the 27th of *July 1842*, the Master found, that a sum of *35 1 3L 4s. 1d.* was due to the representatives of the obligees, for principal and interest on their said bond debt, and for their costs.

Both

1843.
 RICHARDSON
 v.

Both parties took exceptions to the Master's report, which now came on for argument.

HORTON.

Mr. *Kindersley* and Mr. *Walpole*, for the representatives of Messrs. *Griffen* and *Leathes*.

Mr. *Pemberton* and Mr. *Koe*, for Defendants interested in the estate of Sir *Watts Horton*.

Mr. *G. Turner* and Mr. *Rogers*, for the Plaintiff.

Copis v. Middleton (a) was cited.

March 17.

The MASTER of the ROLLS.

It is objected to the Master's finding, that where two are jointly bound and one dies, the obligation survives to the surviving obligor; that no action can be maintained against the executor of the obligor who died first; and that, as an action cannot be maintained against the executors upon the bond, the bond cannot be the foundation of a claim to a specialty debt in equity.

In answer to this argument, it is not alleged, that there was any antecedent joint liability of Sir *Watts Horton* and *Thomas Horton*, or that there was any agreement for a joint and several bond, or any mistake in preparing the bond; but it is said, that it could not have been intended to release Sir *Watts* who was the principal debtor, or his estate, if he happened to die first, and that therefore the bond ought to be considered as joint and several.

I do

(a) *Turner & R.* 224.

I do not think that this argument can prevail. If the bond had been made joint and several, *Thomas Horton* might have been sued upon it alone in the life-time of *Sir Watts*; and there seems to be no reason, even for conjecturing, that he would have consented to this, or to do more than make himself jointly liable; and if joint liability was the intention of the parties, nothing is now to be rectified or altered, and the legal consequences must follow. The obligation, by virtue of the joint bond, survived to the surviving obligor, and there was no legal remedy upon the assets of the deceased obligor. There may be a legal debt arising out of the contract against the assets of *Sir Watts Horton*, but if so, it will not be a debt upon the bond, and must be established by means other than the mere production of the bond.

1843.

RICHARDSON
v.
HORTON.

See *Rawstone v. Parr*, 5 Russ. 424. 539. *Cowell v. Sikes*, 2 Russ.
19 ¹ *Towers v. Moor*, 2 *Vernon*, 98.

1843.

March 17. 20.

WATTS v. GIRDLESTONE.

If trustees are directed to invest trust money on government or real securities, and they do neither, they are answerable, at the option of the *cestuis que trust*, either for the money or the stock which might have been purchased therewith.

Husband and wife had a power to sell real estates, with the consent of the trustees; the monies were, with all convenient speed, to be laid out in the purchase of other lands; and, until a convenient purchase could be effected, it was made lawful for the trustees, with

the consent of the husband and wife, to invest the money in government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security. Held, that the trustees were liable for the stock which the money would have produced in 1816. Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase money.

IN this case, land was vested in the trustees of a marriage settlement. The husband and wife, with the consent of the trustees, had power to sell the land, the money arising from the sale was, with all convenient speed, to be laid out in the purchase of other lands to be settled to the same uses, and, until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money on government or real securities.

The land was sold in the year 1811 for the sum of 2200*l.*, which was not laid out in the purchase of other land, or invested either upon government or real securities, but, in the month of July 1816, it was lent to the husband on merely personal security.

The husband was unable to repay the money, but the full amount had now been paid by his sureties, and to this extent, the trustees had been relieved from their liability.

This bill was filed by the children of the marriage, and sought to charge the trustees with a breach of trust, and to make them responsible for the stock, which the money produced by the sale of the estate would have purchased at the time when it was received by the trustees.

Mr.

Mr. Pemberton Leigh and **Mr. Hubback**, for the Plaintiffs, the *cestuis que trust*, contended, that they were entitled to have made good so much Bank three per cent. annuities, as might have been purchased with the money at the time when it was received by the trustees, or at the time when they lent it to the husband on personal security.

Hockley v. Bantock (a), **Bateman v. Davis** (b), **Cocker v. Quayle** (c), **Dimes v. Scott** (d), **Clough v. Bond**. (e)

Mr. Kindersley and **Mr. C. Bellamy** for the representatives of one of the trustees. Where trustees may invest in stock or on real security, and they lend on personal security, they shall be answerable for the principal money only, and not for the value of the stock which might have been purchased; *Marsh v. Hunter*. (g) The husband and wife had the power of electing whether the securities should be fluctuating, as the public funds, or invariable, as a mortgage. They have chosen the latter, and therefore the trustees are only liable for the fixed sum.

The trust for investment was not imperative; the trustees had no power to invest at all, except with the consent of the husband and wife, which they withheld; at all events, there was no breach of duty until 1816.

Mr. Drewry and **Mr. Austen**, for other parties.

Mr. Pemberton Leigh, in reply.

The object of the parties was to re-invest the money in land; the investment in the funds, or on real security,

was

(a) 1 <i>Russ.</i> 141.	(d) 4 <i>Russ.</i> 195.
(b) 3 <i>Mad.</i> 98.	(e) 3 <i>Myl. & Cr.</i> 496.
(c) 1 <i>Russ. & M.</i> 555.	(g) 6 <i>Mad.</i> 295

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was to be merely temporary and until the money could be invested in land. It seems obvious that the trustees ought not to have risked a conversion of land money, without providing themselves with an authority which would enable them to invest the produce. Such a power alone would make them responsible for the purchase of money arising from the sale, though it might not, however, make them liable for the stock.

The trustees having placed themselves in a position in which their option could not be exercised, it may be a question if they were not bound to make the vestment in such a way as the Court would have directed.

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Whether the trustees are to be charged with money or stock is a question of great importance, and the Court will consider it.

No sale could have taken place without the consent of the trustees; and I cannot say that it was a proper exercise of the discretion of the trustees, to consent to a sale of the real estate, without knowing beforehand what was to be done with the purchase money. By not making a provision for the reinvestment, the whole control was left in the hands of the tenant for life, who might then exercise his power in such a way as to induce the trustees to commit a breach of trust.

March 20. The MASTER of the ROLLS.

If trustees are directed to invest trust money in government or real securities, and they do neither con-

onceive that they are answerable, at the option of the *cestuis que* trust, either for the sum which was to be invested, or for such amount of Bank three per cent. annuities as might have been purchased with the sum at the time when it ought to have been invested according to the trust.

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In the present case, I think that, in a prudent execution of the trust, the *cestuis que* trust ought not to have consented to a sale, until they had first obtained the consent of the husband and wife, either to the purchase of other land, or to the due investment of the purchase money until other land could be conveniently purchased. The settlement, however, did not contain a plain direction for that purpose; and, the consent of the husband and wife not appearing to have been given, the trustees may have been under difficulties respecting the investment; and some time may not have been improperly employed in endeavouring to obtain a proper real security. The circumstances are not explained; and during the time which elapsed between the receipt of the money and the loan to Mr. Watts, I do not think that there are sufficient grounds on which to charge the trustees with more than the amount of the money which they had received; but in lending the money to the husband without real security, they acted in direct violation of their duty, and committed a plain breach of trust; and for that breach of trust I think that they are answerable in the manner most beneficial to the *cestuis que* trust; upon that principle it appears to me that the Plaintiffs are entitled to have so much Bank three per cent. annuities, as the sum of 2200*l.* would have purchased on the 16th day of July 1816, when the money was lent to the husband.

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The Court, under the circumstances of the case, refused to set aside deeds executed by one under restraint in a lunatic asylum, under medical certificates.

When a party, without authority, but *bond fide*, assumes the management of the property of one mentally incompetent, this Court will not, on his recovery, restore to him his property without making an equitable allowance for the expenses and liabilities.

On a bill seeking to set aside deeds *in toto* and praying no alternative relief, the Court will not, adversely, grant an account on the footing of their validity.

THE object of this bill was to set aside as void deeds executed by the Plaintiff, on the ground they were executed by the Plaintiff at a time when he was under confinement as a lunatic under the circumstances after stated.

No replication had been filed, and the cause came upon bill and answer. The answer being thus admitted to be true in all points, it appeared that, in 1822 Plaintiff commenced business as a wine and spirit merchant, and that in 1831, he introduced into this country a wine called *Masdeu*, which he imported to a great extent. The speculation did not succeed, and in 1839 the Plaintiff having a very large stock of this wine on hand, found himself embarrassed in his circumstances. He appears about this time to have contemplated submitting to bankruptcy, but was dissuaded therefrom by the defendants, the brothers of his wife.

The difficulties under which the Plaintiff was suffering preyed upon his mind, and, towards the end of 1839, this, together with mental and bodily exertion, brought on a mental disorder, attended with delusions and occasional paroxysms of violence. In this state of things the Defendants, the father and brothers of Plaintiff's wife, out of kindness and regard, came to the assistance of the Plaintiff and his family. The Plaintiff's state of mind at that time did not appear to be such as to totally disqualify him from attending to his concerns. In January 1840, meet-

of his creditors took place, with the view of making some arrangement and composition; but before their completion it became necessary to place the Plaintiff in a lunatic asylum under the care of Dr. *Allen*. The Plaintiff's malady, to some extent, yielded to the medical treatment and quietude, and in *February* Dr. *Allen* thought he might return to *London* for a short time, by way of trial, and he was accordingly brought to Town by one of the Defendants, and resided with him about a month, and, during part of this time, he was perfectly rational and collected, and during those periods was consulted on the affairs of his business.

The improvement in the Plaintiff's state of health unfortunately was not lasting, and it became necessary, on the 7th of *March*, to replace him under the care of Dr. *Allen*, where he continued till *July* 1841.

The Defendants in the mean time proceeded to complete the arrangements with the Plaintiff's creditors, and, from time to time, communicated to the Plaintiff the progress of their arrangements. The creditors ultimately agreed to release their claims, on receiving portions of the wine stock, and upon the Defendants entering into their own personal liability to secure certain payments. On the 14th of *May*, before the arrangements had been completed, a statement of the Plaintiff's affairs, and the proposition of what was intended to be done were given to Dr. *Allen*, in order to be communicated to the Plaintiff.

On the 14th of *May* deeds were prepared for the purpose of carrying into effect the proposed arrangement with the Plaintiff's creditors, and, on the 1st of *July* 1840, notice of their intended execution was given to Dr. *Allen*.

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On the 4th of *July* the Defendants attended the Plaintiff, who was still in the lunatic asylum, with the deeds for his execution, and the Defendants, being assured by Dr. *Allen* that the Plaintiff was, in fact, during the transaction, in a rational and competent state of mind to execute the deeds, carefully read over the deeds to him in the presence of Dr. *Allen* and his medical assistant, and some alterations were made therein at the suggestion of the Plaintiff. The answer stated, that the Plaintiff fully understood the nature and effect of the said deeds, that he was fully competent to execute them, and was perfectly willing to do so. That he accordingly did execute the same, and in the presence of the two Defendants, his brothers-in-law, and of Dr. *Allen* and his assistant, who attested the execution thereof, and subscribed a certificate as follows, viz.: — “We hereby certify that the deed of assignment, bearing date the 20th day of *May* last was read over to Mr. *Selby* in our presence, he, at the same time, inspecting the deed of release of the same date. And we further certify, that he fully understood the nature and effect of both instruments, and was perfectly willing and competent to execute them, and did so in our presence. As witness our hands this 4th day of *July* 1840.”

The first of these deeds was a deed of composition between the Plaintiff and his creditors, whereby the latter accepted stock and promissory notes of the Defendants by way of composition for their debts.

By the second deed, the Plaintiff assigned the whole of his property to the Defendant, on trust to deliver to the creditors the stock agreed upon, and then to indemnify the Defendants from all liability under the composition deed, and pay the residue to the Plaintiff.

The

The Defendants, the brothers-in-law, proceeded to carry the arrangement into execution, and they made the necessary advances to satisfy the creditors, and in this respect and in respect of their own debts a considerable sum became due, and was still owing to them.

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On the 29th of July 1841 the Plaintiff was discharged from the lunatic asylum, and a disagreement having taken place between him and the Defendants in consequence of the latter refusing for the present to permit the Plaintiff to interfere in the business until the matters had been more settled, the Plaintiff filed this bill, insisting on the total invalidity of the deeds in question, and praying a declaration that the deeds so executed by the Plaintiff whilst under confinement for unsoundness of mind, were void and invalid, and that they might be set aside, and that the Defendants might account and answer for their wilful default.

The bill did not allege any fraud or contrivance on the part of the Defendants, or that they were in any way actuated by considerations of personal benefit, and the bill contained no allegation that the arrangement was injurious to the Plaintiff.

The bill alleged, "that at the time of the execution of the deeds, the Plaintiff had his arms confined, and so fettered as to be unable to do any injury to himself or others, and just before being taken into the room where the Defendants were, his right arm was unfettered, but one or more keepers were, at the time aforesaid, in attendance; that in this condition he was requested to read the said deeds, which he accordingly read, but he had no certain recollection of the effect thereof, except that he understood that the object of the said deeds was to enable the said Defendants *Andrew Jackson* and *John*

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*Reid Jackson to manage the Plaintiff's affairs, and to carry on his business of a wine and spirit merchant during the continuance of his said malady, or if thought requisite, to wind up the said business, and to settle all claims and demands in respect of the same upon or against the Plaintiff. That the Plaintiff read over the said deeds in the presence of the said Defendants and Dr. Allen and Thomas Appleton Nowell Preston, and suggested some alterations therein, and that the same were, or was, altered according to his said suggestions; and that as so altered he was requested to execute the same (but what the nature of such alterations was, the Plaintiff was wholly unable to recollect). That the Plaintiff, being under the impression and understanding that the said deeds were intended only for the object and purposes last thereinbefore in that behalf mentioned, consented to execute the said deeds, and he accordingly did execute the same on or about the said 30th day of June 1840, and that immediately after the said deeds were executed by him, and on his removal to his own apartment, the said restraints or fetters were replaced upon his right hand.*" On these allegations and upon the allegation of mismanagement of the business by the Defendants, which, however, was denied, the Plaintiff seemed to rest his case.

With regard to the fetters, the answer stated, that the Plaintiff during his confinement in Dr. Allen's establishment had been subject to violent paroxysms, and evinced a tendency to self-injury and violence, and that the Defendants had been informed and verily believed, that the Plaintiff, at his intervals of reason, had the impression of such affliction, and did occasionally, fearing a sudden return thereof, request his arms or hands to be secured. The Defendants also said, they believed that at the time they visited him with the deeds, "the Plaintiff, under the

the circumstances thereinbefore appearing had, as the Defendants best recollect, and believed, his left arm partially confined by a leathern belt, but that he had not otherwise his arms confined and so fettered as to be unable to do any injury to himself and others." They said they were informed and believed, that it had been, as thereinbefore appeared, the Plaintiff's custom occasionally to have his arms confined: that from the circumstances aforesaid, they entertained no doubts, though they could not state the same of their own knowledge, that the Plaintiff had, at his own request, on the day in the bill mentioned, before the Plaintiff went into the room where the Defendant *J. Jackson* was with the deeds, his left arm confined in manner before mentioned. They said they believed, that at such time, there was not the slightest occasion for any such restraint or precaution.

It appeared from the answer that on the same day on which these deeds were executed, the Plaintiff executed an indenture of apprenticeship of his son.

The cause now came on for hearing, when

Mr. *Selby*, in person, insisted on the total invalidity of the deeds in question. He argued that having been executed by him at a time when he was in confinement under medical certificates of his lunacy, and when he was not a free agent but in fetters, the same were in law wholly void.

He imputed no fraud to the Defendants, but complained of their injudicious course of management of the property.

Mr. *Kindersley* and Mr. *Rogers* *contra*, contended that it appeared from the answer, which must be taken

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to be true, that the Plaintiff was, at the time of the execution of the deeds, competent to understand and understand their operation and effect. That it was act of the greatest prudence, and that the Defendants were actuated by no personal motives in bringing about the arrangements. That they had incurred liabilities in order to effect the arrangement for the benefit of the Plaintiff, and though they were perfectly willing to account for their acts under the deeds, they submitted that the deeds ought not to be set aside without providing an indemnity for all that they had properly done and for what they had expended for the Plaintiff's benefit. That if the transaction were to be set aside *toto*, the Defendants were entitled to stand in the place of the creditors to the full amount of their debts.

Mr. Selby in reply.

Jan. 28.

The MASTER of the ROLLS.

In this case the Plaintiff by his bill prays, that certain deeds which are dated the 20th of *May* 1840, and which he says were executed by him whilst under confinement for unsoundness of mind, were and are as against him invalid and void, and ought to be set aside. The rest of the prayer is for consequential relief.

By the deeds in question the property of the Plaintiff was assigned to two of the Defendants, and he seeks the relief which is asked for by this bill, on the ground that he was induced to execute the deeds whilst he was confined in a lunatic asylum, under medical certificates that he was a proper subject for such confinement:—that his state of mind was such, that his person was fettered for the purpose of preventing him doing injury to himself and others.

others,—that he was required to execute and did execute the deeds in the presence of his keepers, and was, for the occasion, partially relieved from his fetters with an intent which was carried into effect, of his being immediately afterwards subjected to the former constraint.

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The circumstances thus alleged are no doubt very important, and of themselves are strongly calculated to invalidate the deeds; but when this court is called on to set aside deeds, all the circumstances under which they were executed must be taken into consideration. In this case it is very remarkable that there is no allegation of fraud against the Defendants or any of them, no pretence that coercion was used, or any stratagem or any contrivance employed, to compel or induce the Plaintiff to do an act in any way tending to the personal benefit of any of the Defendants. There is no pretence of any imposition,—no allegation that the Plaintiff had not the means of understanding and was not capable of understanding the effect of that which he did. The Plaintiff so far from alleging that the act done was injurious to him or contrary to his interest at the time, or from insinuating that it was intended otherwise than for the benefit of himself and his family, has, at the bar, frankly and no doubt properly and truly stated, that the Defendants were actuated by motives only of kindness towards himself and his family; that the act done, namely, the execution of the deeds, was, at the time, an act of the highest prudence and greatly to his advantage, and that all that the Plaintiff has since disapproved of, has arisen, not from any desire to injure the Plaintiff, but, as he alleges, from want of judgment, knowledge, and experience, in carrying on the Plaintiff's business; and the Plaintiff's principal ground of complaint, which he has repeatedly referred to, is his exclusion from the personal management of the business.

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The question however is, whether under all the circumstances of this case the court is to set aside the deeds. The Plaintiff may undoubtedly be entitled to relief or to an account under the deeds supposing them not to be set aside, but no such an alternative relief is even asked for in this case.

As the Plaintiff has not replied to the Defendants answer, the answer is the only evidence in the cause—and the Defendants having been precluded by the Plaintiff from every opportunity of examining witnesses, the statements which are made in their answer must be taken to be, in all respects, true, so far as they are consistent with themselves.

Now what do the facts appear to be? [His lordship referred to the facts of the case as appeared from the answer, and which it is not necessary to repeat.]

It is unnecessary to state the deeds further than this, that they appear manifestly and plainly to have been what the Plaintiff himself had called them, deeds which were executed with the highest sense of prudence. He was manifestly in such a state of embarrassment in his affairs, in addition to the condition of his mind, which most probably had become unsettled by the difficulties in which he was placed and by nothing else, that it was utterly impossible for him to proceed. He was insolvent, and as the Defendants state in this answer, deficient to the amount of several thousand pounds. The arrangement consisted of a settlement with his creditors, by the payment of a composition, the greater part of which was secured by the personal obligation and liability of the Defendants Mr. *James Jackson* and Mr. *John Reid Jackson*; by taking upon themselves that personal responsibility, they relieved him entirely from the pressure

pressure of his creditors beyond his own family, and they then, at their personal risk and liability obtained a release for his benefit. In order to afford them an indemnity, which formed a part of their arrangement all through, it was agreed that he should assign his estate and effects to them, that they should apply the proceeds of it for their indemnity, after paying the proper expenses, and when their indemnity had been secured, they were to stand possessed of the whole surplus in trust for the Plaintiff. So that having gratuitously secured him the benefit obtained by means of their own personal liability, all that they asked in return was, that they should be indemnified in respect of that liability out of the property which he at that time possessed.

The question is this, are these deeds to be simply set aside, are these gentlemen to be left with the advances they have made upon the settlement with the Plaintiff's creditors uncovered and entirely at the mercy of the Plaintiff? Is he to be put into the absolute and uncontrolled possession of the property which remains, by setting aside these deeds? And is every thing which has been done for his benefit upon this occasion to be entirely undone? The proposition, I must confess, seems to me to be of a very extraordinary nature. I can hardly believe from what I have seen of the Plaintiff on this occasion, who has conducted his own case not only with ability, but with a very considerable and laudable degree of candour, that a gentleman who has manifested the moral feeling as well as the ability he has done on this occasion, can seriously mean that which this bill purports to aim at, namely, to take to himself the whole property, and the whole benefit which his relations have conferred upon him by their own personal liability, and leave them wholly unpaid and without any remedy whatever. This, however, being manifestly the purport

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purport of this bill, it is sufficient for me to say, that it is not a proceeding which this court can sanction.

It must be admitted, that the Defendants did an act which can by no means be considered consistent with legal prudence; an act which exposed them to very considerable hazard, which made it incumbent on them to shew, at any time when they were called upon to do so, that their proceedings were entirely fair and disinterested, that there was not the slightest personal interest to be obtained, that there was not the smallest imposition practised on the other party. They placed themselves in a position which disentitled them to the ordinary presumptions which are given in the general transactions of mankind. The Plaintiff being in confinement under medical certificates justifying his being confined as a lunatic, and being at the same time under personal constraint, the burden of proof was thrown upon those who dealt with him; the Defendants are not, as I said before, entitled to the ordinary presumptions in their favour. But when the matter comes to be investigated, and it turns out that they have acted fairly and disinterestedly for the benefit of their relation, that they have sought no benefit for themselves, that they have done for him alone an act which was of the highest prudence, I say the deeds, and the circumstances under which the deeds were executed, become of comparatively trifling importance.

If they had assumed the management of this gentleman's property without any deed or any thing of the kind, it would have been a very hazardous act; but if they had assumed the management of his affairs at a time when he was incompetent to manage them himself, this Court, at least, would then have taken into consideration the circumstances under which they did it, would have investigated with minuteness, but would in their favour

favour have considered the prudence and propriety of their conduct, and would not, when this gentleman recovered the possession of his reason, have taken from them the property which remained in their hands, without making them an equitable allowance for the expenses and liabilities to which they had subjected themselves for his benefit.

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It is scarcely necessary for me to proceed further. It is very true that the presumptions against these Defendants are increased, in consequence of the state of this gentleman having been such as to prolong his confinement for a very considerable time after the date of the execution of these deeds. He was not released till a year afterwards, in the month of *July* 1841; his business was in the mean time carried on by the Defendants; and when this gentleman was released, he naturally and properly had a great anxiety to know the state of his affairs. He had naturally (but whether properly or not depends on other circumstances), a great desire to be restored to the full control and management of his property. If he had desired to be restored to the full control and management of the property, for the purpose of working out that trust which was to secure the residue to himself, it would have been quite well. He interfered, however, in a manner which interrupted the business as then carried on by the trustees.

The Defendants were trustees only for the benefit of Mr. *Selby*, and were accountable to him for the surplus, after indemnifying themselves; he had therefore a clear right to call them, and to keep them closely to account. He had the surplus interest, they had the interest to indemnify themselves, he had therefore a right to call upon them to account, but they, in the mean time, had the right to control and manage the property for

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for their interest and indemnity, provided they did it in such a way as was consistent with his ultimate interest. If they failed in that respect, Mr. *Selby* had a perfect right to call them to account, and might have filed a bill, not like this bill to set aside the deeds, but a bill, stating that these gentlemen who, subject to their right to indemnity, were trustees for him, were not carrying on the business in a proper manner, and desiring the assistance and control of this Court to compel them to do so. If he could sustain his case by evidence, this Court would necessarily have interfered for his protection, and would not have permitted the trustees, because they had a personal interest for their own indemnity, to carry it on in such a way as would be injurious to their *cestui que trust*.

There is no such relief sought by this bill, the sole object aimed at by it is, to set aside the deeds, and to leave these gentlemen without any protection at all for the advances they have made, or even for the payment of the composition on their own respective debts.

Under these circumstances I confess that I do not think the Plaintiff is entitled to any such relief as is sought for by this bill. Being, as I think entitled, if he thinks fit, to have an account of the receipts and payments of these gentlemen in the execution of their trusts, he must be under the necessity of filing another bill, unless the Defendants, by arrangement and for the purpose of getting rid of what I think is a troublesome business for them, will consent to have an account taken in this cause, otherwise I must dismiss this bill.

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Affirmed by the Lord Chancellor, 31st of January 1844.

# REPORTS OF CASES ARGUED AND DETERMINED IN THE ROLLS COURT.

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FULLER v. KNIGHT.

*Jan. 26, 27.  
Feb. 28.*

**B**Y a settlement made in 1795, on the marriage of the defendant *Charles Fuller* with *Jane* his wife, two sums of 20,000*l.* and 16,000*l.* consols were vested in trustees, upon trust for the husband for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder on certain trusts, under which the wife was entitled to a contingent reversionary interest in a portion of the fund.

A trustee cannot, by contract, waive his right to resort to the life interest of a tenant for life, for the purpose of replacing a trust fund, which, in breach of trust, he has lent to the tenant for life.

A trustee, in breach of trust, lent the trust fund to *A. B.*, the tenant for life. The trustee afterwards concurred in a creditors' deed, by which *A. B.*'s life interest was to be applied in payment of his debts, and the trustee received thereunder a debt due to him from *A. B.* Before the other creditors had been paid, the trustee retained the income to make good the breach of trust. Held, upon a bill filed by the trustees of the creditors' deed, that this Court would not prevent such an application.

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In 1805, the trustees of the marriage settlement committed a breach of trust, by lending 9000*l.* (the produce of 15,517*l.* consols part of the trust fund) to the husband, on the security of certain *leasehold* property.

In 1816 *Charles Fuller*, the husband, executed a creditors' deed, whereby his interests in the leaseholds and under the marriage settlement, including the 9000*l.*, besides other property, were assigned to trustees for the payment of certain debts.

The Defendant *Robert Knight*, the surviving trustee of the marriage settlement, was one of the creditors of *Charles Fuller*, the tenant for life, whose debt was provided for by the creditors' deed.

Robert Knight concurred in that deed, and received his debt thereunder. He had lately, and before the trusts of the creditors' deed had been fully carried into execution, commenced proceedings by ejectment to recover the possession of the leasehold premises, and he threatened to apply the life interest of the tenant for life in reparation of the breach of trust, alleging that the leasehold security was inadequate.

The trustees of the creditors' deed, who were also unsatisfied creditors under it, thereupon filed this bill against *Robert Knight* and Mr. and Mrs. *Fuller*, praying to have the trusts of the creditors' deed carried into execution, and that the rents and interest of the trust funds and securities might be applied in payment of the monies thereby secured, and that *Knight* might be restrained from interfering therewith, and particularly with the rents of the leasehold property.

The only issue of the marriage had died without acquiring any interest in the trust funds, so that, subject to

to the very remote contingency of issue of the marriage being born, Mr. and Mrs. *Fuller* were the only persons interested in the trust funds, but the interest of Mrs. *Fuller* therein was reversionary.

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The Defendant *Knight*, by his answer, submitted, that it was his duty to receive the rents of the leasehold property and the interest of the settlement funds, and to apply the same towards replacing and making good the 15,517*l.* consols lent to the Defendant *Charles Fuller*, the tenant for life, on the security of the leaseholds, which had become an insufficient security; and he submitted, that it was his duty, as trustee of the said settlement, or at least, so far as he was trustee for the said *Jane Fuller*, to enforce his said claim against the Plaintiffs, as well as against *Charles Fuller*, notwithstanding he might have joined and concurred, as a creditor of the said *Charles Fuller*, in the deed of 1816; for the Defendant was advised, that his joining therein as such creditor could not exonerate or preclude him from performing his duty as a trustee of the settlement of 1795.

Mr. *Kindersley* and Mr. *Wood* for the Plaintiffs. The Defendant, Mr. *Knight*, having concurred in the creditors' deed and accepted the benefit of the trusts, has contracted for the application of the rents and profits in the manner thereby pointed out. He cannot, for the purpose of relieving himself from the responsibility he has incurred, insist on the application of the income in any other way, until the other creditors have been fully paid.

The husband and wife being of advanced age, and there being no issue, and no persons interested in the fund except themselves, there is not the remotest chance

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of the trustees being exposed to any liability in respect of the breach of trust. Both husband and wife are desirous that the former application of the income should be continued.

Mr. G. Turner and Mr. Shapter for the Defendant *Knight*. This Court will not permit trustees to do an act which would be a breach of trust: *Mortlock v. Bulleter*. (a) So it will not order a trustee to abstain from an act which would repair a breach of trust already committed; it will not sanction an arrangement by which a trustee lessens the security of his *cestui que trust*. Here the interest of the tenant for life is primarily liable to replace the stock, and the *cestui que trust* will be left to the personal responsibility of the trustees, if this Court should prevent the Defendant's replacing the fund by means of the life estate. The wife has but a reversionary interest in a chose in action. She is therefore incapable of binding it; and notwithstanding any act she may now do, she might the next day file a bill against the trustee for the restitution of the fund.

There is no estoppel in such a case as this: *Fairtitle v. Gilbert* (b), *Tappenden v. Burgess*. (c)

Mr. Hoare for Mrs. Fuller supported the Plaintiffs' case.

Mr. Kindersley in reply.

The Master of the Rolls.

In this case, the circumstances and the relief sought are very peculiar. The bill asks that the indenture of

1816

(a) 10 *Ves.* 292, and *Wood v. Richardson*, 4 *Beavan*, 74. (b) 2 *Term Rep.* 171. (c) 4 *East*, 230.

1816 may be executed, and that the income of the ~~trust~~ property may be applied under the trusts of that ~~deed~~. The Defendant *Knight*, against whom this ~~prayer~~ is directed, insists, that he has a right to apply ~~that~~ income towards the reparation of the breach of ~~trust~~, in which he was led to join at the request of the Defendant Mr. *Fuller*.

The facts are shortly these: — Mr. *Knight* and other ~~pe~~rsons were trustees of the marriage settlement of Mr. ~~and~~ Mrs. *C. Fuller* of two sums of 20,000*l.* and 16,000*l.* ~~stock~~. The settlement contained a power to sell the ~~stock~~ and lay out the money in the purchase of free-
hold estates. Unfortunately, in the year 1805, the sum ~~of~~ 15,517*l.* stock was sold out, and produced a sum of ~~9000*l.*~~, which, instead of being properly laid out on free-
holds, was lent to *Charles Fuller* on the security of his ~~lease~~hold estates.

It is not denied that this was a breach of trust, and ~~that~~ the persons beneficially interested in this sum had ~~a~~ right to call on the trustees, at any time, to make ~~good~~ the amount of stock sold out. *Knight* is the surviving trustee of the settlement, and he is subject to the liability. Under the circumstances which have taken ~~place~~, Mrs. *Fuller*, the *cestui que trust*, having a reversionary interest in this property, an interest which she is incapable of dealing with, and cannot deprive herself of, has a power to enforce the right of having the breach of trust remedied according to the rules of this Court, and this has been the state of things since 1805.

In 1816, *Charles Fuller*, the tenant for life of the property, being indebted to several persons, executed the deed now in question; it was made between *Charles Fuller* of the first part, *Richard Fuller* and *George Fuller*

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Fuller and Joseph Fuller of the second part, and several persons whose names are in the schedule of the third part. *Knight's* name occurs in the schedule, and he was a creditor who consented to be paid under the arrangement of the deed. The deed, so far as it is necessary to state it, recited the settlement, the subsequent transaction which is admitted to be a breach of trust, and the proposed arrangement for the benefit of the creditors; and the effect of that deed was to assign other property of *C. Fuller* and his life interest in the trust property to trustees, to be applied, in the way stated, in liquidation of the debts; this deed is sought to be enforced by this bill.

What is alleged by the Plaintiffs is this, that *Knight* being a creditor and party to the deed, has so far authorised and directed the application of the income of the trust property to the purpose mentioned in the deed, that he has no right to resort to the interest of *Charles Fuller*, for the purpose of performing the trusts of the settlement, and for repairing the breach of trust which had been committed.

It is admitted, and properly admitted, that the income of the husband ought to be applied in making good the breach of trust, and it is admitted that *Mrs. Fuller*, if she thought fit, might file a bill by a next friend to have it so applied; but this bill, proposing to leave nothing but the personal liability of *Knight* for the reparation of the breach of trust, seeks to withdraw the liability of the life estate, and thus materially diminish the security of the *cestui que trust*.

The answer attempted to be given is this: — it is not proposed to deprive *Mrs. Fuller* of her right to file a bill for reparation of the breach of trust, and a decree

a **decre** may be now made without prejudice to that **right**. It is said that *Knight* is a man of property, and **well** able to replace the fund, but it is forgotten that we **are** not to look at the situation of the persons concerned, and that this Court must act on general principles.

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What is asked is this, that the trustee shall be prevented applying the life estate in making good the breach of trust; and thus leave to chance the reparation of the breach of trust, by confining the remedy to the personal liability of the trustee, or the estates of the deceased trustee.

I cannot reconcile myself to the notion that this is a course which this Court could pursue. The Court, being apprised that a breach of trust has been committed, and that the trustee is desirous of repairing it, is required, for the benefit of other persons, to prevent his doing so, to withdraw the substantial means of reparation of the breach of trust, and to leave the wife, who is now under the dominion of her husband, to her remedy against the trustees.

The question really comes to this, whether the trustee has done, or could do, or would be allowed by this Court to do an act which would fetter his power of performing his duty. His first obligation was to perform the trusts; he had concurred in committing a breach of trust, and the instant he found he had done so, was it not his duty to repair it? And could he be permitted, in violation of his duty, to do an act for his personal benefit by which he deprived himself of the power of performing his duty?

I have no recollection of any such case as this; at the same time it does seem to me, that even if the trustee

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had entered into a direct covenant, these Plaintiffs would not be permitted to require him to perform it, if it appeared that by its performance the security of the *cestui que trust* would be lessened.

There is another point. This gentleman is a mortgagee of the leaseholds, and supposing he is not entitled to what I think he is, namely, to have the fund restored out of the life interest, is he not entitled to make what he can of the mortgaged estate, and to know the extent of his liability?

Mr. Kindersley. I admit I cannot restrain the Defendant's rights as a mortgagee.

The Master of the Rolls. I confess I cannot see my way to granting the relief asked, except by arrangement. It would be a matter of the most serious consequence to *cestuis que trust*, if it were once held that a trustee could bargain away the power which is absolutely necessary for the performance of his duty, and that he could give up that power by contract or by incurring a personal liability.

If no arrangement can be made, the bill must be dismissed.

The cause stood over, in the hope that some arrangement might be come to between the parties.

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Jan. 27, 28.

object of this suit was to obtain a partition of property in *Cornwall* of the tenure of custe-hold.

plaintiff alleged himself to be entitled to thir-tieths of the property, as owner of three terms of 500 years, of 400 years, and of 26 years determinable on lives. The first created in 1760; the second was a mortgage securing 20,000*l.*, derived out of the former, created in 1773, and the third term was created

The Plaintiff, by his bill, traced at length ution of these terms until they became vested f; and he alleged that the term of 400 years since, by lapse of time and otherwise, become ible, and that the Plaintiff had become legally to all the beneficial interest therein.

plaintiff, in 1837, recovered thirteen-ninetieths Defendant *Grigg* by ejectment, but the circum- that proceeding did not appear, or in what way f the Plaintiff was, upon that occasion, made out.

aintiff, at the hearing, failed in establishing the n of the terms, and in shewing that they were sted in him.

ll was filed in 1840, and therefore the recent d not apply. (a)

5 Vict. c. 35. s. 85., t is enacted, "That after the passing of

this act, it shall be lawful for any court of equity, in any suit to be thereafter instituted therein

Independently of the 4 & 5 Vict. c. 35. s. 85., this Court has no jurisdiction to direct the partition of copy-holds, nor of customary freeholds.

On a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court will grant an inquiry: but where there is a material omission in the proof of the Plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the Plaintiff had recovered in ejectment a portion of the estate from the Defendant, it not appearing what were the circumstances of that proceeding, or whether the Plaintiff's title, as alleged, was herein proved.

Mr.

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Mr. *Turner* and Mr. *Collins* for the Plaintiff. statute of 4 & 5 Vict. c. 35. s. 85., (which passed 21st June, 1841), though inapplicable to the plaintiff, shews, not that the Court has no jurisdiction to direct a partition of copyholds, but merely that "it were entertained whether by the practice of such Courts the same can now be obtained." There are however authorities in support of the jurisdiction, as *Dods v. Dodson* (a), *Treherne v. Nash*. (b)

If the title has not been fully proved, the Plaintiff is entitled to an enquiry before the Master as to his interest, as was done in *Agar v. Fairfax*. (c) Plaintiff has recovered the thirteen-ninetieths from Defendant *Grigg* in the action of ejectment; and therefore, cannot set up a want of title in the Plaintiff.

Mr. *Teed* and Mr. *Nevinson*, for the Defendant *Morshead*, did not object to the relief prayed.

Mr. *Kindersley* and Mr. *Speed* for the Defendant *Grigg*. The Plaintiff has wholly failed in making out any title to the property; he is not therefore entitled to any relief or any enquiry. (d) To obtain a partition of freeholds, a Plaintiff must both allege and prove clear and distinct title to the portion of the

for the partition of lands of copyhold or customary tenure, to make the like decree for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a commission for the partition of the same lands, and the allotment, in severalty, of the respective shares therein, as, according

to the practice of such Courts may now be made with regard to lands of freehold tenure.

(a) 2 *Watkins on Copyhold* 153. n., 1 *Scribner* (3d ed.) 643. n. (e)

(b) *Seton on Decr.* 189.
 (c) 17 *Ves. 533*.
 (d) *Marten v. Whichelo & Ph.* 257.

claimed by him; a litigated or ambiguous title is insufficient. *Cartwright v. Pultney* (a); in which case the title made by the original bill being suspicious, the bill was dismissed with costs. The reason for requiring such strictness in the title is obvious; the title of the Defendant, after the partition, would depend on the validity of the conveyance from the Plaintiff, and therefore on his title to convey. The Defendant might make a valid conveyance of his interest to the Plaintiff, and receive an invalid title in return.

A Court of Equity has no jurisdiction to decree the partition of copyholds: *Scott v. Farocet* (b), *Horncastle v. Charlesworth* (c); *Co. Litt. 187. a., note 2.*, *Coke, Copyholder*. It would be interfering with the rights of the Lord in his absence, by dividing his tenements, altering the accustomed rents and services, and forcing upon him a different tenant. There cannot, for these reasons, be a partition without the intervention of the Lord: *Oakeley v. Smith.* (d)

Copyholds are not within the statutes of partition (e), *Scrieven on Copyholds* (g), nor are customary tenements, *Burrill v. Dodd* (h), the freehold of which is in the lord, *Stephenson v. Hill* (i), and which fall within the same consideration as copyholds: *Doe d. Reay v. Huntington.* (k)

In *North v. Guinan* (l) Sir A. Hart held that there could be no partition of leaseholds for years.

The

(a) 2 Atk. 380.	(g) Vol. i. p. 106., note (a) 3d
(b) 1 Dick. 299.	edit.
(c) 11 Sim. 515., 1 Mad. Pr.	(h) 3 Bos. & P. 378.
(d) ed.) 248.	(i) 3 Burr. 1273.
(d) 1 Eden, 261.	(k) 4 East, 271.
(e) 31 H. 8. c. 1., 32 H. 8.	(l) 1 Beat. 342.
c. 32., 8 & 9 W. 3. c. 31., 3 & 4	
Anne, c. 18.	

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The recovery by ejectment in no way proves the Plaintiff's title, nor does it appear that the title now set up by the Plaintiff was ever litigated in that proceeding. The title alleged by the Plaintiff is that of a mortgage of the 400 years term. Such an interest cannot, in the absence of the mortgagor, be made the foundation of decree for a partition.

Mr. Bacon, for a mortgagee of Grigg's share, opposed the partition.

Mr. Turner, in reply.

The jurisdiction of this Court in cases of partition is quite independent of the statutes. *Scott v. Fawcett*, *Oakeley v. Smith*, and *Horncastle v. Charlesworth*, were cases of copyholds, and not of customary freeholds, as they are opposed to *Dodson v. Dodson* and *Treherne Nash*.

North v. Guinan was a different case from the present; there was a tenancy subject to covenants, and the Court would not direct a partition which would have involved the commission of a waste and have prejudiced the landlord.

The Plaintiff has an equitable title, which for the present purpose is sufficient: *Cartwright v. Pultney*. (a)

The MASTER of the ROLLS.

In this case there is really no proof at all of the facts alleged in the bill as constituting the Plaintiff's title, and yet the facts if true are easy of proof.

This is a bill for a partition, and a party who is tenant in common or joint tenant of freehold property has a right

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to a decree for a partition upon proving his title; but in this case two objections have been raised:—first, that the suit relates to customary freeholds, and that the Court has no jurisdiction to order their partition; and secondly, that even if the subject be one over which the Court can exercise jurisdiction, still that the Plaintiff has not proved his title. This property seems clearly to be of the tenure of customary freehold, and I have always understood that the Court has constantly declined directing a partition of copyholds and, for similar reasons, of customary freeholds. Two cases have been produced; they may be consistent with the general rule if there had been both freeholds and copyholds to be divided, and the Court had directed such a partition, as to give the entire copyhold to one party, and the freehold or a part of the freehold to the other. (a)

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It

(a) The following was a case of this description.

DILLON v. COPPIN.

1835.
June 28.

THE freehold and copyhold estates of the intestate, Mr. *Plura*, had descended to three co-parceners.

The Plaintiff, being one of such co-parceners, filed this bill against the other two, for a partition of all these estates; and the Defendants, by their answer, objected that the Court had no jurisdiction to make a partition of the copyholds.

Mr. *James Campbell* for the Plaintiff.

Mr. *Beavan* for the Defendants.

On a suit previous to the 4 & 5 Vic. c. 35. s. 85. for a partition of freeholds and copyholds, the Court directed the copyholds to be allotted in entirety to one of the parties.

SIR JOHN LEACH, M. R. to obviate the objection, directed a commission “to divide the freehold and copyhold estates and Premises in question into three equal parts,” &c., and ordered “that the copyhold part of the estate should be allotted in entirety to one of the said parties.” (a)

(a) Reg. Lib. 1832, A. fol. 2179.

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It is said, that although the property is ~~custom~~ freehold, yet the case is attended with circumstances which make it proper to have a partition; and it is added that the Defendant ought to have stated ~~exp~~ circumstances which would exclude the Plaintiff's right thereto. It appears, however, to me that if the Plaintiff relies on his case being an exception to the general rule, it is his duty to allege and show the circumstances under which he is entitled to the exception.

The next objection to this bill is, that the Plaintiff has not made out his title. It has been admitted that the title is not fully made out; but it is alleged that it is ~~far~~ made out, that this Court will afford the Plaintiff opportunity to enable him to complete the proof of his title, and that there are instances in which the Court has allowed a Plaintiff so to do. I can conceive that where there has been a small omission, the Defendant would scarcely object to the Plaintiff's having an opportunity to supply it; and I can conceive that the Court, seeing a slight omission or slip in the proof, would say that such an objection shall not prevail, and that an opportunity must be given to supply the defect. Though instances have occurred in which the Court has given the Plaintiff an opportunity to complete his title, it is my opinion that a Plaintiff who brings forward his case ~~perfectly~~, is not, as of right, entitled to such an indulgence at the expense of a delay to all the other parties. It has been supposed that it was almost of course to refer the matter to the Master, and reference has been made to the cases in which it was done, but the cases only go to this:—that if it appears that the parties to the cause are entitled to the estate between them, but the shares are uncertain, the Court will, almost of course, direct an inquiry before the Master as to their respective interests; but that is for the common benefit of all.

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The Plaintiff, it is plain, must make out his title, because he calls on the Defendant to accept a legal conveyance in exchange. If he proves no title he is not entitled to a partition. Here the Plaintiff has undertaken to make out his title to thirteen-ninetieths of the property, but has failed.

It is said that he has recovered judgment at law; but under what circumstances does not appear. I collect that the Defendant was in possession of the entirety, and that the Plaintiff recovered thirteen-ninetieths. It does not, however, appear, whether, in that proceeding, the Plaintiff proved his title or if the case was ever tried.

The Plaintiff has failed here for want of proof of title; and I think this case must, therefore, in its result, be treated as in the nature of a nonsuit. He has failed in proving his title; but it has not been proved that he has none.

The bill must, therefore, be dismissed with costs, but without prejudice to the Plaintiff's filing a new bill.

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1843.

Feb. 17, 18. May 1. The ATTORNEY-GENERAL v. The Corporation of SHREWSBURY.

The Crown, in consideration of the past services of the town, the situation and importance of the place, the injury and damage to be expected from the King's enemies, from the current of water, and from the traffic on the bridges, and the ruin likely to take place, if the means of repairing were not provided, granted certain tolls to the corporation of

Shrewsbury, to be applied in reparation of the bridges and walls, without yielding any account or reckoning thereof.

Held, that the grant was not made to the corporation

for its own benefit only, as a reward for prior services: that it was the duty of the corporation to apply so much of the receipts as might be required for the purpose: — that this was a gift for a public and general purpose for the benefit of the town, in aid of a general charge or burden to which the burgesses and inhabitants of the town were liable, and that it was a gift to charitable uses under the *statute of Elizabeth*, and was therefore subject to the jurisdiction of this Court.

THIS information prayed for a declaration, that the sum of *2176l. 17s. 5d.* stock, which had arisen from the sale of certain tolls belonging to the corporation, was part of the capital stock of the corporation *Shrewsbury*, and that the dividends and produce thereof were applicable, in the first instance, in and towards the repair and support of the bridge called the *Wel Bridge*, and also of another bridge called the *English Bridge*, and also those parts of the walls of the town which now remained and required support; and that the capital stock was not applicable towards the current expenses of the corporation, nor towards the payment of any debts incurred subsequently to the passing of the Municipal Corporation Act. The information further prayed for an injunction to restrain the corporation from applying the stock in a manner inconsistent with the right alleged by the information.

The sum of *2176l. 17s. 5d.*, 3 per cent. annuity, which was in question in this suit, arose from the investment of a sum of *2000l.*, which, in the year 1792, was received by the corporation of *Shrewsbury* as the consideration for the release of certain tolls, to which the corporation was entitled under several charters from the Crown.

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The principal questions were, first, whether those **tolls** were held by the corporation subject to a charitable **trust** to be executed in this Court; and if so, secondly, whether the stock in question was now held subject to the same charitable trust.

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The town of *Shrewsbury* was held of the Crown at a **fee-farm** rent and by fealty; and by a grant dated the **22d** of *September* in the forty-first year of the reign of **King Henry III.**, the custom, formerly granted for the **amendment** of the walls of the town from things coming to the town for sale, was continued to the end of a term of **seven years**. By another grant dated the 12th of *February* in the twelfth year of King *Edward I.*, after **reciting** a former grant of the 15th of *March*, of the tenth *Edward I.*, whereby in aid of repairing and amending the **Welch Bridge**, the corporation were, for three years, to take by the hands of persons in whom they could **confide** and for whom they would be willing to account, from things for sale coming into the town, the several **customs** therein mentioned:—it was granted, that after the end of the three years, the corporation might take by the hands of those in whom they might confide, and for whom they would be willing to answer, in aid of the **repair** of the **Welch Bridge**, and also of paving the town, the **customs** aforesaid, unto the end of five years from thence next following.

BY a mandate or precept directed to the Lord Chancellor by King *Richard II.* on the 4th of *June* in the 15th year of his reign, after referring to a former grant of the custom of murage from his liege men passing by the town with their merchandizes for three years which were nearly run out, in aid of the inclosure of the walls and repair of the bridges and gates of the town, it was recited, that on the application of the burgesses, the

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King had granted to them the same custom of murage for four years from the feast of *St. John the Baptist* next coming, for the safety of the town and in aid of the inclosure of the walls and repair of the bridges and gates thereof, and of other the necessary occasions for the defence of the town; so always, that the profits arising from the same custom were employed about the works aforesaid, and thereupon the Chancellor was commanded to cause letters to be made under the Great Seal; and letters patent, dated the 20th day of the same month of *June*, were accordingly made.

The next charter was one dated the 6th of November in the 7th year of King *Henry IV.*, and thereby in consideration that the town was situate near *Wales* on account whereof it required to be fortified and strengthened, the better to resist the King's enemies it was granted, that in aid of the fortification of the town and repair of the walls of the same, the corporation from the date of the grant unto the end of three years, should take from things for sale coming to the town by land or by water, by good, sufficient, lawful and faithful men, whom for that purpose they should order to be deputed, and for whom they should be willing to answer, the custom therein particularly mentioned; and it was commanded, that the corporation should apply, and convert and apply, the said customs about the fortification and repair of the walls of the town, and not to any other uses, by the survey and control of the Abbot of the town or his deputy, and at the end of the three years the customs were to cease.

There was a like grant, dated the 9th of October in the seventeenth year of the reign of King *Henry the Sixth*, and another dated the 15th of *March* in the twentieth year of the same King, and by the last, the grant

~~Grant~~ was continued for twelve years from the date
~~hereof.~~

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In the fourth year after the date of the charter dated ~~the 15th of March~~ in the twentieth year of King *Henry the Sixth* whereby the customs were granted for twelve years, the charter, upon the construction of which the principal question in this cause depended, was granted. It was dated the 12th of *January*, in the twenty-fourth year of the reign of King *Henry the Sixth*, and after granting to the corporation cognizance of pleas and jurisdiction over various matters therein mentioned, it proceeded, in substance, as follows: — “ Further, we, considering after what manner our town is situate adjacent to parts of *Wales*, and the marches of the same, and which, in the times of our progenitors, and especially in the time of King *Henry the Fourth*, stood for the defence and fortification of the people of *England* against the rebels of *Wales*, and which also by *Owen Glendower*, with great multitude, by insulting the town and burning the suburbs had taken the town, and great part of the county of *Salop*, and other adjacent counties, in like manner, had been burnt and destroyed, if it had not been defended by the people within the town, upon the bridges, gates, towers, and walls of the same then being defensible, and as yet very likely, in a similar case hereafter, may be burnt and destroyed by such rebellion, unless the same bridges, gates, towers, and walls shall be repaired, kept and maintained, in a state of defence; and also considering after what manner the bridges are situate, viz. one towards *Wales*, and another towards *England* upon the *Severn*; and no small damages have happened to the arches and stonework of the same bridges, by the rapid course of the water there, and also by carriages passing over the same, and greater damages are likely to happen to the same in process of

Q 2 time,

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time, and the ruin thereof, to the destruction of the town and county and the country there, may be feared, unless they are repaired and amended in a short time, as it is said, and we, desiring to provide these opportunities for the repairing, amending, fortifying, walling and defending the bridges, gates, towers and walls, to the resistance of the rebels of *Wales* and other malefactors willing to injure the town; also considering the letters patent of the 15th of *March, anno 20*, and the several customs thereby granted," (which were stated at length,) "which same sums of money yearly arising from the customs, during the term aforesaid, greatly fall short for the sufficient or reasonable reparation of the town walls, bridges, gates and towers aforesaid, as we are now more fully informed, we, for the reasons aforesaid, have granted for ourself and our heirs, to the bailiffs and burgesses of the town aforesaid, their heirs and successors for ever, that they, by the hands of lawful men whom they shall from time to time depute for that purpose, may, from time to time for ever, take all the customs aforesaid, in manner aforesaid yearly to be taken, for the reparation, amendment, and fortification of the bridges, gates, towers and walls of the town, to the resistance of the rebels of *Wales*, and the marches of the same, and the same sums of money yearly arising from the said customs to apply and expend, from time to time, about the reparation, amendment and fortification of the bridges, gates, towers and walls aforesaid, to be made for the strengthening the same towers, without yielding any account or reckoning thereof to us or our heirs, or of the receipts of the same in any wise." And the grant contained a discharge of all arrears of accounts and receipts, "and of other causes whatsoever which had accrued, or thereafter might have accrued to his Majesty for the premises or any of them, against the said bailiffs or their successors in any wise howsoever."

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The grant was afterwards confirmed by charters of *Henry the VII.* and *Charles the I.*

The corporation continued to receive the tolls down to the year 1789, and they kept the *Welch* bridge in repair. Shortly afterwards the bridge became so damaged, that it became necessary to rebuild it, and it became desirable to the neighbourhood to widen the bridge, and to abolish the tolls.

In 1792 the corporation agreed to abolish the tolls, in consideration of the sum of 6000*l.* which was raised by subscription; of this they applied 4000*l.* towards rebuilding the bridge. The residue was invested, and now consisted of the sum of 2176*l.* stock, standing in the names of three of the members of the borough council.

The corporation, after the passing of the Municipal Corporation Act (5 & 6 W. 4. c. 76.), being indebted to their former town clerk for compensation under that act, were about to apply the fund in question in payment of that debt, and this gave rise to the present information.

Mr. *Pemberton Leigh*, Mr. *Turner*, and Mr. *Romilly*, in support of the information, argued, that the charters of the Crown had devoted the tolls to a public trust. That the trust was of such a nature as to come within the charitable uses mentioned in the statute of *Elizabeth* (a); and, therefore, that the Court had jurisdiction to see to the due application of the fund.

That the stock, being the produce of and substitute for the tolls, was affected with similar trusts, and that its application

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application in the way proposed by the corporation would be a diversion of it from the legitimate purposes, and a breach of trust, which this Court would prevent.

Mr. Kindersley, Mr. Walker, and Mr. Kenyon, *contra*, for the Defendants, contended that, under this charter, the corporation became absolutely entitled to the customs thereby granted, free from any trust: that although the grant might make them liable to the duty of making the repairs, the means of making which were given by the grant, yet that the duty was not and could not be annexed to the receipt of the customs, and could not be enforced by compelling them to apply the customs for the purpose intended; and that the duty, if to be enforced at all, was to be so by some other means.

They also contended that the grant was made as a reward for past services; that from the exemption from the duty to render any account, it was plain, that the corporation was not intended to be, and ought not to be held accountable to the Crown, or to the King's Courts for the application of any part of the money; and further, that if the corporation were entitled to the tolls for a public purpose only, that purpose was not civil but military, and therefore that the Crown only, and not the Court of Chancery, could direct the application.

The Attorney-General v. The Haberdasher's Company (a), *The Attorney-General v. The Mayor of Galway* (b), *The Attorney-General v. The Corporation of Carlisle* (c), were cited.

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(a) 1 *Myl. & K.* 420. (c) 2 *Sim.* 457.
(b) 1 *Molloy*, 103., *Beat.* 298.

The MASTER of the ROLLS.

From the several charters anterior to that of the twenty-fourth of King *Henry* the VI., it appears that the grants were made for some public purpose affecting the welfare or safety of the town, such as the amendment of the walls, the repair of the *Welch* bridge, the paving of the town, the safety of the town, the repair of the bridges and gates, and other necessary occasions for the defence of the town. The customs were to be taken by the hands of persons in whom the corporation could confide, and for whom they were willing to answer. In the three last charters, the grant is in aid of the fortification of the town and repair of the walls, and the money was to be applied under the survey and control of the Abbot of the town or his deputy, or, as the two last charters say, of *John Ashfield*, and a time was limited for the cesser of the customs.

By the last charter of the twenty-fourth of King *Henry* the VI., we have a grant in perpetuity, instead of a grant for a short term of years. The King exempts the corporation from rendering any account or reckoning; the corporation is not subjected to any special survey and control in the expenditure of the sums to be received; but, in consideration of the past services of the town, the situation and importance of the place, the injury and damage to be expected from the King's enemies, from the current of water, and from the traffic on the bridges, and the ruin likely to take place if the means of repairing were not provided, the grant was made, expressly, that the money might be applied and expended about the reparation, amendment and fortification of the bridges, gates, towers and walls to be made or the strengthening of the town.

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The Defendants contend, that under this charter, the corporation became absolutely entitled to the customs granted, free from any trust: that although the grant might make them liable to the duty of making the repairs, the means of making which were given by the grant, yet that the duty was not, and could not be annexed to the receipt of the customs, and could not be enforced by compelling them to apply the customs for the purpose intended; and that the duty, if to be enforced at all, was to be so by some other means. Assuming, as I must do for the purpose of this case, that the Crown had power to grant the customs in question, I can have no doubt that the corporation, by accepting the grant, became liable to the performance of the duty thereby imposed; the money to be received was, according to the express direction contained in the grant, to be applied for the purposes therein mentioned; and I am of opinion, that it was the duty of the corporation so to apply so much of the receipts as was required for those purposes.

The Defendants have contended that the grant was made as a reward for past services, that, from the exemption from the duty to render any account, it is plain that the corporation was not intended to be, and ought not to be, held accountable to the Crown, or to the King's courts, for the application of any part of the money, and further, that if the corporation were entitled to the tolls only for a public purpose, that purpose was not civil but military, and therefore that the Crown only, and not the Court of Chancery, could direct the application.

It appears to me that the argument, that the grant was made to the corporation for its own benefit only, as a reward for prior services, is contrary to the plain terms of the charter, which, whilst recognising the past services of the burgesses, states, as the inducement for

the **grant**, the necessity of providing for the future defence of the town, and accordingly directs the money to arise from the customs to be applied for that purpose.

It further appears to me, that the customs, or the **right** to levy them, were considered as belonging to the **King**, and to be capable of being granted by him for **public** purposes; that in the former grants, the **burgesses** were held to be accountable to the Crown, for the sums which they received and their application **thereof**, but that the charter of the twenty-fourth **Henry VI.** in exempting the corporation from the account, only released the corporation from the beneficial **interest** which the Crown had, or was supposed to have, in the customs received, but did not release the corporation from the right which the Crown had, for the **benefit** of the subject, of seeing that the duty, for the **performance** of which the customs were granted, was **performed**. I conceive that the reparation of the bridges and walls ought to be considered as the duty of the **burgesses**, that the expense of performing the duty was a common burden upon the **burgesses** and inhabitants; that if there had been no grant of the Crown, either in aid or expressly for the purpose, the whole burden would have fallen upon the **burgesses** and inhabitants; that the grants were therefore made, *pro tanto*, in relief of the **burgesses** and inhabitants, and in diminution of the collections or assessments, which, in some form or other, would otherwise have been made upon them; and that to whomsoever the duty of directing the construction of the walls and fortifications might have belonged, the raising the money was a civil duty, and the relief afforded by the grant was the relief of a civil burden.

Now the statute of *Elizabeth* (a) enumerates among gifts to charitable uses, gifts for the "repair of bridges, ports,

(a) 43 *Eliz. c. 4.*

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ports, havens, causeways, churches, seabanks, and highways," and for "aid or ease of any poor inhabitant concerning payments of fifteens, setting out of soldiers and other taxes ;" and Sir John Leach expresses himself to be of opinion, that funds, supplied from the gift of the Crown, or from the gift of the legislature from private gift, for any legal, public, or general purpose, are charitable funds to be administered by courts of equity. Some doubt has been thrown upon the generality of this position, but I am not aware of any decision by which it has been impeached. A question, however, is made upon the subject of the gift ; and the case of *The Attorney-General v. The Corporation of Glastonbury*, before Sir Anthony Hart, is referred to. (a) In that case Sir Anthony Hart felt a difficulty, in consequence of the tolls which were the subject of the gift having been created *de novo* for the purpose of the grant ; but he thought that if the Crown, being entitled to tolls, grants them to a charitable use, they are subject to all the incidents of other property so granted. Now in this case, it appears that the customs granted in the twenty-fourth of Henry VI. were not then created : the origin of them is not shewn, but they had been the subject of grant by the Crown for nearly 200 years before ; and, as I have before stated, it appears to me, for the purposes of this cause, I ought to presume that the Crown had a right to make the grant.

On the whole, I think that this was a gift for a public and general purpose ; that it was given for the benefit of the town in aid of a general charge or burden to which the burgesses and inhabitants of the town were liable ; and that it was a gift, which, under the equity of the state

(a) 1 *Molloy*, 103, 104, 108; *Beatt.* 298.

statute of *Elizabeth*, ought to be considered as a gift to charitable uses.

The subsequent charters of *Henry VII.* and *Charles I.* do not appear to me to affect the question. The customs, or tolls as they were called, continued to be received by the corporation till the year 1792. Sometime previously the inconveniences arising from the narrowness of the bridge and from the toll, had become a subject of complaint, and an arrangement was made for the abolition of the tolls, on payment to the corporation of 6000*l.*, of which 4000*l.* was to be applied towards building a new bridge, and the remaining sum of 2000*l.* was to be paid to the corporation. This arrangement was carried into effect. The corporation actually received the sum of 2000*l.*, which was lent at interest to a person of the name of *Loxdale*, who had an account with the corporation, upon the balance of which sometimes more and sometimes less than 2000*l.* was due. The debt of 2000*l.* was called in in the year 1837, and invested in the purchase of the sum of 2176*l.* 17*s.* 5*d.* Bank 3 per cent. annuities now in question. The information was occasioned by an avowed intention, on the part of the corporation, to sell the stock or part of it, in order to raise money for the purpose of liquidating debts contracted by the corporation. As it is not denied that the 2000*l.* invested in 1837 represents the 2000*l.* paid to the corporation in 1792 as part of the consideration for the tolls, I think that the stock must be subject to the same trust, which, as it appears to me, was attached to the tolls.

I must therefore declare, that the 3 per cent. Bank annuities were held by the corporation in trust to apply the dividends in or towards the repairs of the bridges and walls; and that the injunction &c. already granted ought to be continued.

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BLACHFORD v. KIRKPATRICK.

Even after great delay and acquiescence, the Court will not compel a purchaser to complete, if the title appears to be manifestly bad.

The right to the tithes of an allotment generally follows the right to the old tenement, in respect of which the allotment is made.

Contract for the purchase of tithes not signed by the party chargeable, held, under the circumstances, to have been taken out of the Statute of Frauds.

MESSRS. James and Joseph Kirkpatrick were owners of a renewable lease, under *Winchester College*, of a farm called *St. Cross*, in the parish of *Carisbrooke*; to this farm there was appurtenant a right of common over the forest of *Parkhurst*.

In 1812 an act passed for enclosing the forest; but the right to tithes was not thereby interfered with. Under the powers of this act, Messrs. *Kirkpatrick* had awarded, in respect of the *St. Cross* farm, 130 acres of the forest situate in the parish of *Carisbrooke*.

In 1812 the Plaintiffs, or parties represented by them assuming to be entitled to the *tithes* of the allotment of 130 acres as lay impro priators of the parish of *Carisbrooke*, agreed to sell to the *Kirkpatricks* the rectorial tithes of such allotment for the sum of 700*l.* It did not appear that any agreement in writing was signed by the purchasers. An abstract of title was delivered, and the purchasers prepared a conveyance, which, in 1819, was submitted to and approved of by the vendors. It was not however executed; the reason for which did not however appear. Interest had been paid on the purchase money down to 1835, at the rate of 4 per cent.

The purchasers died, and the matter being mooted in consequence of the discontinuance to pay interest, the abstract was, in 1836, found, when it appeared that, by a deed of 1758 under which the vendors claimed, the tithes of *St. Cross* farm were excepted out of the grant to them of the rectorial tithes of the parish of *Carisbrooke*.

brooke. The Defendants thereupon contended that, as the vendors had no title to the tithes of *St. Cross* farm, they had none to the allotment made in respect of that farm.

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In 1838 this bill was filed for a specific performance, and for a declaration that the purchasers had accepted the title.

The Defendants said, that the farm consisted of *North St. Cross* and *South St. Cross*; that the former was tithe free, and that the tithe of the latter had been purchased by the *Kirkpatricks* in 1810. That no tithes were therefore payable in respect of the allotment, though the parties had acted under the erroneous supposition of the contrary. They insisted that there had been no contract in writing signed by the purchasers, and claimed the benefit of the Statute of Frauds.

**Mr. Pemberton** and **Mr. Prior**, for the Plaintiffs.

The Plaintiffs are at once entitled to a decree for payment of the purchase money, without any reference as to the title. The Defendants have accepted the title; and there has been such a course of conduct on their part, as to disentitle them to any further investigation of it. *Fleetwood v. Green* (a), *Margravine of Anspach v. Noed* (b), *Haydon v. Bell* (c), *Hall v. Laver*. (d)

As to the Statute of Frauds, there has been a sufficient acquiescence and part performance to take the case out of that Statute. There has been a possession and enjoyment of the tithes since 1812, a payment of interest on the purchase money, an approval of the title and

(a) 15 *Ver.* 594.

(c) 1 *Beavan*, 557.

(b) 1 *Med.* 310.

(d) 5 *Y. & Coll.* 191.

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and a settlement of the conveyance. It is now too ~~late~~ to say that there is no contract in writing.

It does not appear that the allotment was made ~~in~~ respect of the farm, or whether it was made for land ~~alone~~ alone in the parish of *Carisbrooke*, and the defence is ~~not~~ properly raised by the answer. They also cited *The Bishop of Carlisle v. Blain.* (a)

Mr. *Boteler*, Mr. *George Turner*, and Mr. *Piggott*, for the Defendants. The contract, even if valid, was entered into under a mistake, and on the supposition that the vendors, and not the purchasers, were entitled to the tithes. The Court would relieve in such a case, even after payment of the purchase money. *Bingham v. Bingham.* (b)

If the Plaintiffs have no title, it would be a strong measure of equity to compel a purchaser to pay his purchase money without receiving the property in return. This Court would not force a bad title on a purchaser. *Warren v. Richardson.* (c)

It is plain that the vendors have no title. The tithes of the allotment belong to the party entitled to the property in respect of which the allotment is made, *Steele v. Manns.* (d) It appears from the deed of 1758, which is the root of the Plaintiffs' title, that the tithes of the *St. Cross* farm did not pass to them; and it appears further, that, so far as tithes were payable, they were purchased in 1810 by the *Kirkpatricks*.

There is no sufficient signed contract, nor has there been an acquiescence, the delay in completing has most probably

(a) 1 *Y. & J.* 123

(c) *Younge*, 1.

(b) 1 *Ves. sen.* 126.

(d) 5 *B. & Ald.* 22.

probably arisen from this very objection. There has been no possession taken; for tithes were never payable in respect of the allotment, and therefore cannot be said to have been retained.

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Mr. Hale in the same interest.

Mr. Pemberton in reply.

The Master of the Rolls.

Nov. 19.

I confess, I feel very considerable difficulty as to part of this very singular case, considering the great length of time which has elapsed since the contract was entered into.

The Plaintiffs are asking for a conveyance, in pursuance of a contract entered into in the year 1812. The Defendants have set up several defences, which, upon the best consideration I can give them, and having regard to the great length of time which has elapsed, and to the acquiescence of the party in the terms of the contract during the whole of that time, I think cannot be sustained. It appears to me, that there is sufficient proof of the contract being entered into in this case by *Joseph*, on behalf of *Joseph* and *James*. It is sufficiently proved, as it appears to me, that both parties intended to complete this contract in the year 1816; and that, at that time, both parties had approved of the title, and had acquiesced in it in a most extraordinary and emphatic manner, there being on the one side a payment of the interest of the purchase money, avowedly as such, and on the other side, the constant acceptance of the interest, as the interest of the purchase money.

Now

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Now without meaning to say that the single circumstances here set forth would, in themselves and without the lapse of time, be held to be an acquiescence in and confirmation of the contract, and a sufficient proof of the existence of a valid contract, yet, having regard to the length of time, I must say, that, in my opinion, they must be so held. This does not get over the difficulty I feel in the present case; for if the parties delay asking for the specific performance of a contract and for a conveyance of the legal estate, as they might do, and in the interval before the contract is completed, and while the purchase money is in the hands of one party, and the legal estate in the other, it should turn out, that that title which had been supposed to be good, was really a bad title, I am not prepared to say, that this Court, knowing the title to be bad, would order the party to accept it, and pay the purchase money for it. That is what is alleged at the bar to be the case in the present instance, though it is by no means stated on the pleadings in a way that such a defence, in my opinion, ought to have been stated.

Having read these answers, I find no where an intimation of a mistake, except in the answer of *James Kirkpatrick*; there is there an intimation of a mistake which both parties were under, that, although *St. Cross* farm might be free from the payment of tithes, and although a portion of the tithes of *St. Cross* farm might have been purchased by the Defendants, yet nevertheless, it was believed that the impropriator or the person entitled to the tithes of the forest would be entitled to the tithes of the allotment. This, it is suggested, was the mistake on which both parties at the time proceeded.

On that point, it seems to be now stated, that a conveyance of the tithes of the farm of *South St. Cross* had, in

in the year 1810, been made to the *Kirkpatrick*s. It is alleged that the *North St. Cross* farm was free. That had nothing whatever to do with any allotment; but the contract is for the sale of the tithes of the allotment: both parties, as it is said, then thinking, that the tithes of the allotment remained in the *Blachford*'s, although the tithes of *St. Cross* farm or part of *St. Cross* farm might belong to somebody else.

It is said that the case of *Steele v. Manns* (a) was decided after the date of the contract, and after the negotiation between these parties, and that there was some new law propounded. I do not think it was. It was clear law that the tithes of an allotment follow the fate of the tithes of the land in respect of which the allotment is made, unless there be some special circumstances.

Then it is said there are some special circumstances here. The right of the *Blachfords* to the tithes and the right of common of the persons who were entitled to the old tenement named *Carisbrooke*, extended over three different parishes, and certain extra-parochial places. It might therefore have happened, that the allotment was not made in the parish of *Carisbrooke*, where the old tenement was, but might have been made in other parishes, or in the extra-parochial place. It is stated, however, in answer, that it appears the allotment was made in the parish of *Carisbrooke*. I must, however, say it appears to me, that if the party intended to rely on these circumstances, they ought to have been brought forward in a manner more distinctly than has been done. I will not presume to say what was the real state of this title, but this I think I must state, that

if

(a) 5 *Barn. & Ald.* 22.

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if it did appear to the Court that there the vendor had no title at the time this contract was entered into, and the matter being left, by the acquiescence of both parties, as it certainly must have been, in the same state, the money being in the hands of the purchasers, and the legal estate, such as it was, in the hands of the sellers, this Court would not, knowing there was a bad title, order a conveyance to be made and accepted.

I think the best course I can pursue upon it is this = take it for granted at this moment, that the Plaintiffs suppose they can make out that in the year 1819 a good title could have been made. If a good title could have been made at that time, then I think all the rest is proved here, and that there ought to be a payment of money and conveyance; but if it should turn out that in the year 1819 a good title could not have been made, I do not know what would be the effect of the length of time that has since elapsed. Whether a good title could have been made at the time when that abstract was examined by these parties, is the question. I think there ought to be a reference to ascertain whether a good title could be made in 1819, if the Plaintiffs desire or are willing to take it, rather than have the bill dismissed. If the bill is to be dismissed, it ought to be dismissed without costs.

Declare that there was a binding contract, which ought to be performed, if a good title could have been made on the 18th of June 1819, and refer it to the Master to ascertain that fact.

1843.

MATTHEWS *v.* BRISE.

March 11.

THE Defendant *Brise* was the sole executor and trustee under the will of the testator, who died in 1834. The Defendant, in 1839, realised part of the estate of the testator, which he deposited with a banker. The Defendant, who by the will was empowered to invest this sum in parliamentary stocks or public funds of *Great Britain*, or on real securities in *England*, had, previous to receiving the money, entered into arrangements for lending a portion of it on a mortgage security. In order to make the money profitable in the meantime, he directed the investment of 5600*l.* in Exchequer bills. This investment was accordingly made on the 4th of *March* 1840, by Messrs. *Wakefield*, who were brokers, but acted in some respects as bankers, and had to some extent enjoyed the confidence of the testator in his lifetime. The Exchequer bills were left, undistinguished from others, in the hands of Messrs. *Wakefield*.

Where a trustee has trust money in his hands which he is authorised to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing a contemplated mortgage security, in investing the money in exchequer bills.

A trustee properly invested trust money in exchequer bills, but he left them in the hands of a broker; upon a misapplication of them by the broker, held, that the trustee was personally liable.

A trustee was empowered to invest in the public funds or on real security. He had in his

Various delays occurred in the perfecting the mortgage, and before it was completed, and in *April* 1841, Messrs. *Wakefield* became bankrupts, when it was discovered that they had sold 4000*l.*, part of the Exchequer bills, and had applied the produce to their own use.

This bill was filed by the children of the testator, to make Mr. *Brise*, the executor and trustee, responsible

for hands a sum, which, in the interval between receiving and investing in a contemplated real security, he invested in exchequer bills, which he left in the hands of a broker, who misappropriated them: Held, that the trustee was liable for the value of the exchequer bills at the time of the loss, and not for the stock which the money would have purchased.

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for the loss which had occurred by the failure and misconduct of Messrs. *Wakefield*.

The cause came on upon bill and answer.

Mr. *Pemberton*, Mr. *G. Turner*, and Mr. *Chandless*, for the Plaintiffs.

The question is this: was the Defendant justified in keeping a large portion of the trust funds invested in Exchequer bills for a period of twelve months, in the expectation of completing a mortgage security? The will authorised him to invest in parliamentary stocks or public funds, or on real securities in his name; but the Defendant had no authority to invest in Exchequer bills. He made no investment authorised by the power, and, therefore, he is liable to replace the stock which might have been purchased with the money.

Again, supposing him justified in investing the money for a temporary purpose in Exchequer bills, still he acted without due care in allowing them to remain in the custody and power of another person; and without taking care to have them distinguished from other Exchequer bills in the possession of the brokers. In *Clough v. Bond* (a), Lord *Cottenham* says—"It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative

(a) 3 *Mylne & Cr.* 496.

representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive." And, after referring to the cases of unauthorised securities, his Lordship adds (*a*), " So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator; *Langford v. Gascoyne* (*b*), *Lord Shipbrook v. Lord Hinchinbrook* (*c*), *Underwood v. Stevens.*" (*d*)

The Defendant is, therefore, liable to replace the stock which would have been purchased with the money lost by the failure of the brokers. They also cited *Hanbury v. Kirkland*. (*e*)

**Mr. Kindersley** and **Mr. Phillips**, for the Defendant.

The Defendant had the power of investing in real securities; some delay must necessarily occur in completing a mortgage transaction; and the question is, what was to be done with the money intended to be invested in the interval? Was it to lie idle at the banker's?

(*a*) *Page 497.*

(*d*) *1 Mer. 712.*

(*b*) *11 Ves. 333.*

(*e*) *3 Sim. 265.*

(*c*) *11 Ves. 252.* and *16 Ves. 477.*

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banker's? Would it have been prudent to have invested it in the funds, incurring the double expense of investing and selling out, and running the risk of a fall in the price of stocks, or was it not more proper and prudent to invest the amount in the least fluctuating of government securities?

If the money had been left in the hands of the bankers, the Defendant would have incurred no liability. Is the case to be dealt with differently, because the Defendant invested the money in a better, viz. a government, security? The Defendant would have been justified in paying the money into the bankers generally and unmarked, why is he not equally justified in placing, in the same way, the exchequer bills in the possession of a banker or broker both for safe custody, and to receive the interest and exchange the bills when paid off.

In all cases of this description the question is, whether the trustee has used the ordinary degree of caution and prudence which he would exercise in his own case, and in respect to his own property. In *Ex parte Belchier* (a), Lord Hardwicke says, "where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses. There are two sorts of necessities; first, legal necessity; second, moral necessity. As to the first: a distinction prevails &c.; second, moral necessity, from the usage of mankind, if a trustee acts as prudently for the trust as for himself, and according to the usage of business. If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable."

So

(a) *Ambler*, 218.

So in *Bacon v. Bacon* (a), where one executor remitted to another a sum of money for payment of the testator's debts which he misapplied, Lord *Loughborough* thought the former not liable; he said (b), "If the business was transacted in the ordinary manner, unless there was some circumstance to awaken suspicion, surely the allowance is fair."

If the Defendant is liable, he is answerable only for the money, and not for the stock. There was no selling out of stock, and no breach of trust committed by the purchase of the exchequer bills. The default, if any, must be taken as at the last proper investment, when the trust property consisted of money.

The Master of the Rolls without hearing a reply said:—Cases of this kind are certainly very painful. In this particular case, the Defendant acted throughout, with an anxiety to do that which was best for his *cestuis que trust*. It has not been attempted to throw the slightest imputation upon him; and, however unfortunate the issue of this matter may be, he has the consolation that he goes out of Court with his character perfect, and his honour unimpeached.

The Defendant was the trustee for the Plaintiffs. A sum of money to the amount of 6000*l.* came into his hands, a portion of which he thought it would be most beneficial to the family to lay out on mortgage security. This was entirely within his power. The mortgage security could not of course be perfected without some delay, for it was obviously necessary, in a prudent and proper management of the business, that some things should.

(a) 5 *Ves.* 331.

(b) Page 334.

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should be done before it could be safely completed. Pending the interval, the Defendant laid out a considerable portion of the money in the purchase of exchequer bills. This investment was of such a nature that it might be converted into money at any time, and during the time which must necessarily elapse, that is, from the period when the money was lying dead in the hands of the bankers, down to the time when it would become fruitful upon the mortgage, it would by these means make some interest for the benefit of the family.

I am of opinion, under these circumstances, that the Defendant was very well justified in laying out the money in Exchequer bills during that interval. He, however, unfortunately left them entirely under the control of other parties, and intrusted to them the possession. Instead of securing them in the ordinary mode, he permitted them to remain undistinguished in the hands of brokers, who, in some respects, acted as bankers, who held them and had the absolute power of disposing of them; was it right, or is it to be justified, that a trustee should leave such securities as Exchequer bills in the hands of a banker or broker, who acquires the power of disposing of them as he may think fit? Was it not transferring to those persons that trust and confidence for which he was answerable? It is said, that this was just the same thing, as if the Defendant had left a balance in the hands of the bankers. It is to be observed, however, that he did not do so, and I don't think that it is necessary on this occasion to consider how long a trustee may keep money which he is desirous to employ for a particular purpose in the hands of a banker. When the Defendant had purchased Exchequer bills, he might have kept them perfectly safe, either in his own hands, or he might even have kept them in the hands of those persons, distinguishing them, however, from

from the other property they had; and though they would still be liable to loss by fraud or embezzlement, still they would have been free from that species of misapplication which was resorted to upon the present occasion.

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It seems to me to be a case of very great hardship; and it is impossible to feel any thing but regret at the loss which falls upon this gentleman; but it would be a greater regret if the loss were to fall upon those depending upon his vigilance and care for their protection. The Defendant has made himself liable, because he omitted to take due and proper precaution for the protection of the fund. Having omitted to take it, and having transferred the confidence which was vested in himself to other persons of his own appointment, for whose conduct, it appears to me, he is personally answerable, I think I am bound to decree in favour of the Plaintiffs in this case; and this gentleman must make good the money, and must also pay the costs of this suit.

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The Defendant was charged with the value at the bankruptcy of the 4000*l.* Exchequer bills, with interest thereon at 4 per cent.

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1843.

March 14, 15.

## SANDON v. HOOPER.

A mortgagee in possession, held liable for a damage occasioned by his pulling down two cottages on the property.

A mortgagee in possession will be allowed for repairs necessary for the support of the property, and for doing that which is essential for the protection of the title of the mortgagor. If he has got the consent of the mortgagor or has given him notice in which he acquiesces, he may be allowed for money laid out in increasing the value of the property, but he is not justified in increasing the value of the estate by improvements so as to cripple the mortgagor's power of redemption.

THIS was a suit for redemption.

In 1830, the Plaintiff mortgaged some property to the Defendant, a solicitor, for 300*l.*; and, in 1836, he executed to him a further charge, for a sum of 140*l.* part of which consisted of a bill of costs due from the Plaintiff to the Defendant, and other part of arrears of interest and money paid.

Default having been made in payment of interest on the mortgage, the Defendant, in 1838, by an action of ejectment, recovered possession of the mortgage.

After the Defendant had taken possession, he pulled down two cottages on the premises and made some alterations.

By his answer, the Defendant stated that he had laid out 300*l.* in substantial repairs and lasting improvements; but of this no evidence was given.

Mr. Chandless, for the Plaintiff, contended, first, that there ought to be a taxation of so much of the Defendant's demand as consisted of professional costs, *Wrong v. Denham (a)*; secondly, that the mortgagee was liable for

(a) 2 Y. & Col. (Exch.) 117.

Mortgagee in possession, claiming upon a bill for redemption, to be allowed for substantial repairs and lasting improvement, but adducing no proof of any such expenditure, held not entitled to any enquiry on the subject.

for the damage done by pulling down the cottages, *Wragg v. Denham*; and, thirdly, that the Defendant ought to pay the costs of the suit, it having been occasioned by his improper conduct in refusing to render accounts. *Detillin v. Gale* (a), *Taylor v. Baker* (b), *Harvey v. Tebbutt* (c); and see *Wilson v. Cluer*. (d)

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Mr. *Kindersley* and Mr. *Stevens*, for the Defendant, did not oppose the taxation, but contended that the Defendant was entitled to an inquiry as to the substantial repairs and lasting improvements, and to be allowed the amount; and that the Defendant was entitled to the costs of suit, and of the ejectment.

Mr. *Chandless*, in reply. There is no proof of any substantial repairs or lasting improvements; the Defendant, therefore, is not entitled to any inquiry.

The Master of the Rolls.

It is objected on behalf of the Plaintiff, and properly objected, that so far as the sum of 140*l.* consists of the bill of costs, which is payable to the Defendant, it ought only to stand as a security for so much as will be properly due upon taxation. That is not disputed by the Defendant; it has been very properly conceded to the Plaintiff, that he is entitled to have that investigated.

In the year 1838, the Defendant obtained possession by an action of ejectment, and after he came into possession, he pulled down two of the cottages which were upon the premises, and he says, in his answer, that he laid out a considerable sum of money, to the amount of about

(a) 7 *Ves.* 583.
(b) *Daniell*, 71.

(c) 1 *Jac. & W.* 197.
(d) 4 *Beavan*, 214.

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about 300*l.*, for repairs and substantial improvements, which he alleges were done with the privity and knowledge of the Plaintiff. First, with respect to the dilapidations, they are proved ; and there is not an attempt made in evidence for the purpose of shewing that it was proper. I am therefore of opinion, that the Plaintiff is entitled to an account of any loss occasioned by pulling down those houses.

The next question is, whether the Plaintiff is entitled to any thing for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times, shewing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property ; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem ; this is what has been termed, improving a mortgagor out of his estate—an expression which has been used both in this argument, and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property.

Now,

Now, in this case, it has also to be considered, whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion, that it was not necessary for the Defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made; but, in this case, there is, as to that, a total absence of all evidence whatever. There is evidence, on the part of the Plaintiff, to shew that what was done deteriorated the property, and there is not one word in evidence, on the part of the Defendant, in support of his allegation, that he has laid out any money for lasting improvements, or that any thing he did was done with the privity, consent, or knowledge of the Plaintiff. In the absence of all proof, it is not at all within my authority to direct an inquiry to enable him to supply that in the Master's office, which he has already had an opportunity of doing. (a) He may have done something towards the improvement of the estate; and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject; but there is no such proof brought forward.

Another point has been raised in this case as to the refusal of the Defendant to account. To excuse his refusal, the Defendant alleges that he was under a mistake as to the party on whose behalf the application was made; but I think the circumstances sufficiently shew there was no mistake.

Under

(a) See *Marten v. Whichelo*, Cr. & Ph. 257.

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Under these circumstances I shall direct no inquiry as to lasting improvements: I think the Plaintiff is entitled to an inquiry, as to the loss sustained in consequence of pulling down the cottages: he is entitled to a taxation of the bill of costs, which formed part of the consideration for the further charge; and, considering the course the Defendant has taken, I think he is liable to pay some of the costs of this suit. I cannot, however, take it for granted, that this suit would not have occurred if the estate had not been dealt with as it appears to have been; I cannot therefore say, that the Plaintiff is to be excused from the whole costs of the suit up to the hearing. I think the Plaintiff must pay the costs, except those which relate to the claim for lasting improvements,—those relating to the Plaintiff's claim for compensation for the dilapidations, and those which have arisen from the evidence, which the Plaintiff has been obliged to enter into for the purpose of showing the refusal to account. There must be an inquiry taken of what is due to the Defendant for principal and interest, and for the costs payable by the Plaintiff.

Mr. Kindersley asked for the costs of the action of ejectment.

The Master of the Rolls. The Plaintiff is entitled to those costs: that has often been decided.

1848.

WARD v. WARD.

March 16.

IN this case, an infant had been made a co-plaintiff with several other persons, and Mr. Johnson his **father** had, without any authority, been named his next **friend** by the Plaintiff's solicitor. It was now moved, that the bill might be amended by striking out the **name** of the infant by Mr. Johnson his next friend, or by striking out the name of the next friend, and that the solicitor might exonerate the next friend from any **costs** to which he might be liable.

The Plaintiffs and the next friend had already been ordered to pay the costs of the Defendants of some **interlocutory** application, and *subpœnas* for costs had issued.

Mr. Kindersley in support of the motion.

Mr. Selwyn, for some of the Defendants, asked, that in any order which might be made, the Defendants' **interest** might be protected as regarded the costs; and also that there might be no further delay in bringing the suit to a hearing.

Mr. Parsons, for the solicitor, objected to the form of the notice of motion, and contended what was proposed to be done could not be considered an amendment. He insisted that Mr. Johnson had, after knowledge of his being named next friend, acquiesced in and sanctioned the proceeding. That the infant was a proper person to be made a Co-plaintiff, and ought not to have been

The name of a person who had been made the next friend of an infant Plaintiff without his authority, ordered to be struck out, but liberty was given to the co-Plaintiffs to amend by naming a new next friend.

As to the liability of the next friend in such a case as regards the Defendant.

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been made a Defendant; and in *Hosking v. Nicholls* (a) extra costs, occasioned by an infant being made a Defendant who ought to have been made a Plaintiff, were not allowed. *Wilson v. Wilson* (b) was also cited.

The Master of the Rolls.

The objections made to this application are, ~~first~~, that it is wrong in point of form, that it is not the usual simple application to strike out a name from the record, but an application to amend by striking it out; ~~but~~ though perhaps it is not strictly an amendment in ~~the~~ sense in which the word has been used in the argument for the respondent, still I do not think that this objection can prevail.

It is then said, that the infant was a proper party to be a Co-plaintiff, and that his father was the ~~most~~ proper person to be his next friend and guardian. This I will assume, still the solicitor ought to have applied to the father in the first instance for his consent, ~~and~~ ought not to have relied, as he seems to have done, on the representations and instructions of other persons. Where the interest of a person is such that he ~~ought~~ to be a Co-plaintiff on the record, and being applied to, refuses to join in the suit, and in consequence of such refusal he is made a Defendant, whereby additional and unnecessary costs are thereby occasioned, it is a very proper subject for consideration, at the hearing, ~~e.g.~~, whether he shall be allowed those additional costs. That I understand was the question raised before Vice-Chancellor *Knight Bruce* in the case which has been referred to. But because it is convenient to the other Plaintiff that another person should be joined with ~~th~~ them on the record, can it be for a moment contended,

(a) 1 *Yor. & Col. (C. C.)* 478.

(b) 1 *Jac. & W.* 457.

tended, that any party whatever has a right to use the name of that other person without his authority or against his consent, and thereby expose him to the risk of being subjected to the costs of the suit? It could not be contended for a moment. Precarious indeed would the situation of every man in this country be, if he could, in a case in which other persons thought it right and convenient to join him in the suit, be made subject to all the costs, in case of the failure of the suit.

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The question is, therefore, to be considered upon its merits. Was authority given by Mr. Johnson to the solicitor to file this bill, and if not, has there been such subsequent acquiescence in the proceedings as to entitle the Court to say, that from such subsequent sanction an authority must be implied? In this case, it is admitted that there was no previous authority, and having attended to the affidavits throughout, I think there is nothing in them from which I can collect that he ever acquiesced in the use of his name as a party prosecuting this cause; under these circumstances, without interfering in respect of this infant, I think that the name of this gentleman as next friend of the infant must be struck out. The other Plaintiffs may then procure another next friend to be inserted. This will not occasion any great delay, although the suit cannot be prosecuted until a new next friend has been appointed.

Then comes the question, what is to be done with regard to the costs. Now I think that there are precedents in similar cases which I will look at before I make any order as to the costs, in order that I may make an order in this case, as nearly as circumstances will allow me, in conformity with the former orders. The Court has been obliged in the confidence it must place in solicitors to assume that there has been no ill practice,

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and the consequence has been, that the Defendants have been held entitled to be protected; the Court in more than one case has said, that when a party who has been made a Plaintiff without his authority, afterwards procures his name to be struck out from the record, he shall still as against the Defendants remain responsible for what has happened. (a) I wish to see the orders before I determine what ought to be done about the costs.

Mr. *Kindersley*. Should the form of the order be such as to leave Mr. *Johnson* under his present liability to the Defendants?

The Master of the Rolls.

That is one of the points as to which I wish to see what has been done in former cases.

(a) See *Wade v. Stanley*, 1 *J. & W.* 674. and *Hood v. Phillips, ante*, 176.

EXTRACT FROM THE ORDER.

Order the name of Mr. *Johnson* to be struck out. Let the Plaintiffs have liberty within a fortnight to amend, by inserting the name of *R. G. W.* as next friend of the infant. Order the solicitor to pay to Mr. *Johnson* all such costs as have been occasioned by his being named next friend, (including his costs of this application) and to pay the Defendants the costs of this application.

March 16.

LOPEZ v. DEACON.

An admission
of the posses-
sion by an
agent on
behalf of the
Defendant
and other

IN 1814, the father of the Plaintiff and certain other parties, by their tin bounders and setters, granted to *William Smith Amies*, as the agent of the Defendant *Deacon*, persons who are not parties to the cause, of documents relating to the matters in question, does not entitle the Plaintiff to an order for their production.

Deacon, and of other persons his co-adventurers, the right of working tin mines within certain bounds, rendering by way of royalty one-twentieth of the tin risen, clear of costs.

The bill in this case was filed by the representative of *Lopez* alone against the Defendant *Deacon*, and against the co-grantors for an account of the dues, but it did not make the other co-adventurers parties.

The Defendant *Deacon* by his answer stated, that the original "sett" was in the hands of the bankers of himself and his co-adventurers, and had been deposited by him and his co-adventurers jointly; and he admitted that certain documents were in the possession of the captain of the mine, but he stated that they were held by the captain, and that the original sett or licence was also held by the bankers for him jointly with his said co-adventurers, and the same ought not to be produced in the absence of such co-adventurers; he stated the names of some, and gave the description of others of his co-adventurers, and insisted they were necessary parties to the suit.

A motion was now made, that the Defendant might produce the documents.

Mr. *Pemberton* and Mr. *Shapter*, in support of the motion.

The lessor has a clear title to the inspection of these documents, in order to ascertain the extent of his rights.

The production of the documents is a mode of obtaining the discovery of the matters, much less expensive than that which results from requiring them to be set out at length in the answer. A statement by a Defendant that papers are in the joint possession of himself and other persons, is not a sufficient excuse for his not setting out

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the contents, unless he shews that he has used his best endeavours to set them forth, and that it is practically impossible for him so to do, *Stuart v. Lord Bute* (a), *Taylor v. Rundell*. (b) If, therefore, the Defendant is bound to discover these matters by answer, he is equally bound to give the same discovery by their production.

Mr. G. Turner and Mr. Neate, *contra*.

The right to the production of documents depends on principles quite different from those which regulate questions of the sufficiency or insufficiency of an answer. To entitle a Plaintiff to the production of documents, you must have a clear admission of the Defendant that they are in his possession, and also of his exclusive right to them. You cannot order *A.* to produce documents in the joint possession of himself and *B.*, nor can you, in the absence of *B.*, order *A.* to produce documents in which *B.* is interested. This was laid down by Lord Cottenham in *Murray v. Walter* (c), where the Defendant, by his answer, stated, that certain books relating to a concern in which the Plaintiff claimed to be a partner with the Defendant, were in the possession of the treasurer of the concern, on behalf of the several shareholders in it, many of whom were not parties to the suit. It was held that the Defendant could not be ordered to produce the books in question. Lord Cottenham said (d), "The only order which could possibly be made, would be an order against that Defendant who has made this admission; but to order him to produce these documents, would be contrary to what I have always understood to be the practice of the Court. When documents are stated in the answer to be in the possession

(a) 11 *Simons*, 442, and 12 *Simons*, 460., affirmed by the Lord Chancellor, March 1844.

(b) *Cr. & Ph.* 104.; 1 *Y. & Col.* (C. C.) 128.; and 1 *Phil.* 222.

(c) *Cr. & Ph.* 114.
(d) *Ib.* 124, 125.

possession of *A.*, *B.* and *C.*, you cannot order that *A.* shall produce them, and that for the best possible reason, namely, that he could not produce them." Lord *Cottenham* afterwards added, " It is perfectly true, that if documents are in the hands of an agent, the principle of the Court is, that the possession of the Defendant's agent, is the possession of the Defendant against whom the order is made. But here the agent is the agent not only for the Defendant against whom the order is prayed, but also for other Defendants. The Defendant against whom the order is prayed, has not the possession of the documents either personally or through an agent. I have always understood the rule to be that, under such circumstances, the Court would not make an order for the production."

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So in the case cited of *Taylor v. Rundell*, Lord *Cottenham* said (a), " It is true that the rule of the Court, adopted from necessity, with reference to the production of documents is, that if a Defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot, or may not be able to do; the other is, that another party not present has an interest in the document, which the Court cannot deal with."

Mr. *Pemberton*, in reply, referred to *Walburn v. Ingilby*. (b)

*The MASTER of the ROLLS.*

If this were a case of a lessor filing a bill, against one of the lessees, who being the sole manager of tin mines, for

(a) *Cr. & Ph.* 111.

(b) 1 *Myl. & K.* 78, 79.

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for himself and other co-adventurers, had possession of the documents, either by himself or by a person whom he had appointed captain of the mine, or the agent of himself and all the co-adventurers, I should be very much disposed to think, that according to the old practice of the Court, the Plaintiff would be entitled to an order for the production of these documents.

I do not think that the case is so stated in the answer. What is stated is, that there are other persons besides the Defendant who are interested in the accounts, and that these books are partly in the possession of the Defendant, and partly in the possession of another person, who is appointed on the behalf of himself and all the other co-adventurers. That may be an evasion, but that is the effect of the answer as I understand it.

Lord *Cottenham*, in the cases cited, states distinctly that you cannot order the production of papers on the admission of one person, if other persons are interested in them. I cannot, therefore, in the face of those decisions, make an order for the production of these papers. The effect will be merely to increase the expense of the suit; for, in one of two ways, the contents of these papers may certainly be had. The Plaintiff may either make all the persons interested parties to the suit, or he may press the Defendant for a full discovery of the contents of these documents by his answer. I think that, if the power of the Court is to be really restricted in the way that is alleged, the only effect will be to increase the expense of obtaining that discovery which a Plaintiff is entitled to.

I cannot make the order, the costs must be costs in the cause.

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## HEWETT v. FOSTER.

March 17.

THE testatrix, *Jane Pinkney*, being entitled to a sum of 2194*l.* consols, standing in the names of two trustees, by her will, dated in 1835, gave and appointed unto *Daniel Grigg Hewett* and *John Foster*, all her stocks, &c. and personal estate, subject to the payment of her debts, &c., upon trust to invest on government securities, and pay the dividends to *Sarah Hewett* for life, with remainder to her children; and she appointed *D. G. Hewett* alone executor.

The testatrix died in *August 1835*, and *Hewett* alone proved the will. The trustees, in whose names the fund was standing, transferred it into the joint names of *Hewett* and *Foster*. In *October 1835*, *Hewett* "applied to *Foster*, and represented to him, that the whole, or some considerable part of the sum of 2194*l.* 15*s.* 8*d.*, would be required for the purpose of discharging the testatrix's debts, and funeral and testamentary expenses, and the legacies given by her will; and he also represented, that it had been the testatrix's intention that the said Bank annuities should be lent to him *D. G. Hewett*; and he stated that it would be more for the advantage of the parties entitled to the testatrix's residuary estate, that the whole of the sum of Bank annuities should be sold at one and the same time, and that after applying so much of the proceeds thereof as should be required for that purpose, in payment of the debts, funeral and testamentary expenses and legacies, the residue thereof

should

liable to replace so much of the stock as had not been applied in payment of debts, &c., and to account for the dividends.

A testatrix gave her personal estate to *A.* and *B.*, subject to debts and legacies, upon certain trusts, and she appointed *A.* alone executor. *A.* fund, over which the testatrix had a power of appointment, was transferred into the names of *A.* and *B.* *A.*, the executor, representing that a considerable part of the fund was wanting to pay debts and legacies, induced *B.* to join in selling out the fund, promising to give a mortgage security for what might not be wanted for debts, &c. *A.* received the whole, but applied a very inconsiderable sum in payment of debts, &c. Held, that *B.* was

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should be retained by him, *Daniel G. Hewett*, upon his giving an adequate mortgage security for the same, which he undertook to do."

*Foster* thereupon executed a power of attorney to *Hewett*, enabling him to sell out the stock. *Hewett* sold it out, and received the produce, amounting to 2002*l.*, and after applying 55*l.* in payment of debts, &c., he retained the remainder. *Hewett* afterwards gave a security to *Foster* for 1947*l.*, being the surplus. *Hewett* fell into difficulties, and the securities could not be realised.

This suit was instituted by the children of *Sarah Hewett*, to make the trustees liable for a breach of trust.

Mr. *Pemberton* and Mr. *Beavan*, for the Plaintiffs, asked that the Defendants *Hewett* and *Foster* might be declared liable to make good the stock.

Mr. *Kindersley* and Mr. *W. H. Clarke*, for the Defendant *Foster* contended, that the executor had a right, in the first place, to possess himself of all the assets, and that as the debts and legacies of the testatrix were charged on the fund in question, and were payable thereout by *Hewett*, the sole executor, *Foster* was justified in placing, and would not have been justified in refusing to place, the fund in question in his hands, to be administered by him. That if *Foster* were responsible at all, he was merely liable for the amount of the money, and not to replace the stock.

Mr. *Chandless*, for *Hewett*, the other trustee.

Mr. *Twells*, for other parties.

*The*

*The Master of the Rolls* said that the fund, undoubtedly formed assets for payment of the funeral expenses, debts, and legacies of the testatrix; and if the exigency of the case demanded its application thereto, and *Hewett* had required it to be transferred to him for that purpose, this might have been a sufficient justification to *Foster* for so doing; but here the application made to *Foster* by *Hewett* was, that after payment of the debts, &c., the residue should be lent to him, *Hewett*.

That he was of opinion, that *Foster* was answerable for the breach of trust, for so much as had not been applied in payment of debts or legacies, that he must, therefore, be decreed to replace so much of the stock as had been unnecessarily sold out, must account for the dividends from the death of the tenant for life, and pay the costs of this suit.

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## PARKER v. YOUNG.

March 21. 23.

THIS was a creditor's suit for the administration of the estate of *John Young* deceased. A reference being made to the Master to take the usual accounts, &c. the Defendant *Bulppett* was found to be a creditor of the estate of *John Young* to the amount of 3094*l.*, under the following circumstances :

On the 22d of January 1833, letters of administration of the personal estate of *James Young* were granted to his brother *John Young*, on his executing to the Ordinary

Where no proceedings have been taken to put an administration bond in suit, a sum due from the administrator at his death to the estate of the intestate, is not a specialty debt.

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Ordinary an administration bond in the form directed by the Statute of Distributions. (a)

The clear residue belonged to *John Young* and his brother *William Young* a lunatic.

*John Young* collected the personal estate of *James Young* rendered an account, not to the Ordinary but to the Stamp Office, and on the 29th of *May 1839*, he retained his own share of the residue; he died largely in debt to the estate of *James Young*.

On the 11th of *September 1841*, letters of administration of the estate of *James Young*, unadministered by *John*, were granted to the Defendant *Bullpett*, the committee of *William Young*, who was found by the Master to be a creditor of *John Young* to the amount of 3000 and upwards, the amount due from him to the estate of *James* at the time of his death.

Under these circumstances *Bullpett* claimed to be specialty creditor to this amount, alleging that the conditions of the bond were broken, that the Ecclesiastical Court ought, *ex debito justitiae*, to order that the bond be attended with on the trial of an action, and that the Ordinary ought to be considered as a trustee for the administrator *de bonis non*.

Mr. *Pemberton* and Mr. *Willcock*, for *Bullpett*.

Mr. *Wray* and Mr. *Glasse*, *contra*.

(a) 22 & 23 Car. 2. c. 10. s. 1. The conditions of the bond are first to make and exhibit an inventory, &c.; secondly, well and truly to administer according to law; thirdly, to make a true ac- count of the administration, and pay the residue to the person appointed by the Court; and fourthly, to render the letters of administration if a will should thereafter appear.

*The Archbishop of Canterbury v. Tappen (a), The Archbishop of Canterbury v. Robertson (b), The Archbishop of Canterbury v. Tubb (c)* were cited.

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*The Master of the Rolls.*

March 23.

The question is, whether the administrator *de bonis non* ought now to be considered a specialty creditor of *John Young* upon the administration bond, and I think that he is not.

The bond is taken pursuant to the Statute of Distributions, and remains subject to the control of the Ordinary.

In the case of *The Archbishop of Canterbury v. Tubb (c)* it was determined, that an action on the bond could not be maintained, even in the name of the Archbishop, without production of the bond, as by that means the control of the Ecclesiastical Courts over suits on administration bonds would, in effect, be destroyed.

An action upon the bond can only be maintained in the name of the obligee, and the administrator *de bonis non* has no independent right to sue upon it; — it remains in the judicial discretion of the Ecclesiastical Court, to determine according to circumstances, whether the order that the bond shall be attended with shall be granted or not. In the absence of all authority on the subject, it does not appear to me that any one can be a specialty creditor under a bond which he does not produce, which is not under his control, which was not executed

(a) 8 B. & C. 151.

(c) 3 Bing. N. C. 739.

(b) 1 Cr. & M. 690.

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executed to him or to his intestate, but was executed to a public officer, and remains subject to the judicial control of the Ecclesiastical Court, which has discretion to determine whether the bond shall be put in suit or not, and on what terms.

I am of opinion that the administrator *de bonis non* is not a specialty creditor.

April 1. 3.

### CHIDWICK v. PREBBLE.

A Plaintiff does not, by obtaining an order to amend, between the time of giving notice of a motion for the production of documents and its being heard, deprive himself of his right to their production.

THE Defendant, by his answer, admitted the ~~possession~~ session of certain documents, and the Plaintiff gave notice of a motion for their production. Before the motion came on to be heard, the Plaintiff obtained an order to amend his bill.

Mr. Pemberton and Mr. Dixon now moved for ~~the~~ the production of the documents.

Mr. Bloxam *contra*. The Plaintiff having obtained an order to amend, cannot call for the production of the documents until the amended bill has been answered. The Defendant may now by his answer protect himself from discovery, and the Plaintiff may, by his amendment, strike out the only equity on which his right to production is founded. He cited *De la Torre v. Bernalles.* (a)

The  
(a) 4 Mad. 396.

*The Master of the Rolls* overruled this objection and ordered the production of some of the documents.

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See *Goulwaite v. Rippon*, 1 *Beavan*, 54., and *Martin v. Fust*,  
8 *Simp.* 199.

## RIGBY v. RIGBY.

April 5.

THE answer of the Defendant had been sworn in *October 1842*, but the Defendant had neglected to file it.

On the 28th of *February 1843* the Plaintiff's solicitor, having notice of this circumstance, applied for and obtained the traversing note under the twenty-first and twenty-second general orders of *August 1841*. (a) This he did without giving notice to the Defendant.

Traversing note, obtained *ex parte* by the Plaintiff, with notice that the Defendant's answer had been sworn, discharged, but the Defendant ordered to pay the costs.

Mr. Kindersley applied to discharge the order for the traversing note, to enable the Defendant to file his answer to the bill.

Mr. James Parker, contra.

*The Master of the Rolls* disapproved of the practice of retaining the answer after it had been sworn, but said that the Plaintiff's solicitor, knowing the answer was ready, ought not to have obtained the traversing note without first communicating with the other side. That he

(a) *Ord. Can.* 170.

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he could not allow the Defendant to be deprived of ev— opportunity of properly making his defence, and that should remove the obstacle of the traversing note up— payment by the Defendant of the costs.

April 4.

EVANS v. SALT.

Gift of personality to A. for life, and afterwards to his children, and in default to the heirs of B. Held, that the next of kin were entitled under the ultimate limitation.

JAMES SALT, by his will, among other thin— gave to *Sarah Evans*, his reputed natural daught—, for her use and benefit only, during her life, and after her death to be equally divided amongst her childr—, the sum of 1000*l.* 3 per cent. consols, and also to *James Salt Brown*, his reputed natural son, the sum of 1000*l.* 3 per cent. consols for his own use and benefit, during his life, and at his death to his children equally, or in default of issue to the heirs of the above named *Sarah Evans*.

James Salt Brown died on the 26th day of *September* 1842, without having been married; *Sarah Evans* died in *September 1837*. The plaintiff *William James Evans*, her eldest son and heir at law, claimed the fund on which the 1000*l.* had been invested.

The petitioners, the next of kin of *Sarah Evans*, also claimed the fund under the ultimate limitation to the heirs of *Sarah Evans*.

Mr. *Pemberton* in support of the petition contended that having regard to the nature of the property, which was personality, the word "heirs" must be construed "next of kin."

Mr.

Mr. C. J. Selwyn, *contra*, contended that the heir of *Sarah Evans* was entitled. He cited *Mounsey v. Bla-*
mine (a) where a testatrix amongst other pecuniary lega-
cies gave "to her heir 4000*l.*" and it was held that the
heir at law and not the next of kin was entitled.

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 ~~~~~  
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*The Master of the Rolls* was of opinion that the  
 next of kin were entitled and ordered accordingly.

(a) 4 *Russ.* 584.

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LOCKHART v. HARDY.

*April 6. 27.*

**J**OHN WASTIE had devised estates upon trust for sale, in aid of his personal estate to pay debts, and left other estate to descend on his heir at law; he died in 1825.

Four suits were instituted by creditors and legatees against the executor and heir at law of the testator, and a decree for taking the usual accounts was made in all the suits.

The Master, under the authority of the fifty-first of the general orders of the 9d of *April 1828* (a), determined that the parties entitled to attend the future proceedings were, the Plaintiff in the first cause, who was a legatee and had the conduct of the decree, the executor, and the heir at law.

Under a decree in an administration suit, certain parties only were allowed to attend before the Master. The Master approved of some suits being instituted by the receiver, who was to be indemnified out of the estate. The funds appearing by affidavit to be "abundantly ample," the Court ordered the institution of the suits, and the payment of costs.

(a) *Ord. Can.* 22.

out of the fund standing to the general credit of the cause, upon service on those only whom the Master had authorized to attend him on the reference.

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LOCKHART  
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The heir at law presented a petition founded on the Master's report, that the Receiver in the causes might be directed to institute certain suits which had been approved by the Master, in the name of the executor, against debtors to the estate, that the executor should be indemnified out of the estate, that the receiver's costs might be allowed in passing his accounts, that it should be referred to the taxing master to tax the costs of obtaining the Master's report and of this application, and that the amount might be paid out of the fund in court standing to the general credit of the four causes.

The only parties served with the petition were the Plaintiff in the first cause and the executor; but the order was made.

The Registrar, on an application to draw up the order, objected, that all the parties in the four causes ought to have been served with the petition, since the general fund was to be affected.

Mr. Shapter in support of the petition now applied for the direction of the court.

Mr. Kindersley for the Plaintiff and executor.

The MASTER of the ROLLS said, that inasmuch as the executor and heir at law were (if the estate was more than sufficient to meet the demands upon it) interested in preserving the fund; he would, if the petition were amended by stating that the assets were sufficient to pay the debts and legacies, and that statement was properly verified by affidavit, make the order as prayed without requiring the other parties to be served.

It appearing by affidavit that the fund was upwards  
of £10,000*l.* beyond the liabilities

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LOCKHART  
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*The Master of the Rolls* this day made the order.

ENGLAND *v.* DOWNS.

1842.  
Dec. 14. 16, 17.

THIS case is reported *ante* (a), where it will appear, that on the 5th of *August* 1818, Mrs. *Mason*, who married the Defendant *Broad* on the 26th of *October* following, executed a voluntary settlement of her property in favour of herself and the daughters of her first marriage, to the exclusion of the husband.

That the husband took possession of the property and carried on the business of victualler until *August* 1822, when he sold the business, stock and effects.

His wife died in 1833, and the property was claimed under the settlement by the three daughters; viz. the Plaintiff Mrs. *England*, and the Defendants Mrs. *Barton* and Mrs. *Davies*. The claim was resisted on the ground that the settlement had been made without his knowledge, pending the time he was paying his ad-

The goodwill of a Victualler's business held, under the circumstances, to be incident to the stock and licence, and not to the premises on which the business was carried on.

A widow carried on the business of a licensed victualler on premises held by her from year to year. Prior to her second marriage, she assigned her household goods, furniture, stock in trade, brewing utensils, dresses

(a) 2 *Beavan*, 522.

and all other her effects upon trusts excluding her husband. She married, that the goodwill of the trade, which was afterwards sold, passed by the deed as incident to the stock and licence, and not to the husband with the premises.

A husband carried on the business of a victualler with stock, &c. which formed the separate estate of the wife; in carrying on the business he disposed of the consumable stock, and substituted similar articles, and at a subsequent period he sold the stock and business. By the decree an account was directed against the husband of the stock comprised in the settlement and sold. Held, that the Master properly included the substituted stock in the account.

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dressses to Mrs. *Broad*, and was therefore a fraud on his marital rights and void. This defence failed, and it was referred to the Master to take an account of the household goods, stock in trade, and effects comprised in the indenture of settlement, which were sold by the Defendant *John Thiery Broad* in the month of *August* 1822, and of the value thereof, and of the application of the money arising from the sale thereof.

The Master by his report found, that the household goods, stock in trade, and effects conveyed or assigned by the indenture of settlement, or so much thereof as were then remaining in the possession of Mr. *Broad*, were, in *August* 1842 sold by him to *Davies*; but the stock in trade being fluctuating, he found that certain articles which were assigned by the indenture of settlement were not included among the articles so sold to *Davies*, and that other articles were then sold to him, which were not assigned by the said indenture. And he found that the household goods, stock in trade, and other effects sold to *Davies* were valued and appraised, together with the goodwill of the business on the premises in which the business of a retail victualler had been carried on at the sum of 902*l. 6s. 5d.*, which was made up as follows:—

|                                      |       |
|--------------------------------------|-------|
| Household goods, furniture, fixtures | £408  |
| Stock in trade                       | - 284 |
| Goodwill of the business             | - 210 |
|                                      | —     |
|                                      | £902  |
|                                      | —     |

which sum was received by the Defendant, and with which (after deducting the duty), the Master charged him.

The

The Defendant *Broad* took several exceptions to this report. By the first five, he, in different forms, objected that the Master had not taken the accounts of the household goods, stock in trade, and effects comprised in the settlement and sold by the Defendant in 1822, &c. as directed by the decree.

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By the sixth, he objected to the Master's having charged him with the 90*l.* The seventh and eighth related to the evidence.

By the ninth, he complained that the Master had not allowed him the 210*l.* paid for the goodwill.

The remainder referred to items of payments disallowed to the Defendant, and amongst them a sum of 123*l.* for money laid out during the time the trade was carried on, and 178*l.* for the increased value of the stock beyond that belonging to Mrs. *Broad* on her marriage.

With respect to the goodwill of the business, it should be stated, that the business was carried on at premises in *Cider House Passage*, held from year to year, and that the house was not specifically assigned by the settlement; that if it passed at all thereby, it must have passed under the words, "All and every her household goods, furniture, plate, linen, china, books, stock in trade, brewing utensils, and all other the effects of her, *Joan Mason*," set forth in the schedule, and no schedule was added to the deed.

Mr. *Kindersley* and Mr. *Chandless* for Mr. *Broad*, in support of the exceptions, contended, that the Master had not taken the accounts directed. He was directed to take an account of the stock in trade comprised in

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the settlement and sold by *Broad*, whereas he had ~~had~~ included the after purchased stock, and all the stock ~~which~~ which existed at the time of the sale, whether included ~~had~~ in the settlement or not, and had improperly charged ~~had~~ the Defendant with the amount.

As to the goodwill they argued that the *Cider House* to which it was attached could not pass under the settlement by the words "stock in trade, &c., and other effects" in the schedule, and therefore did not become subject to the trusts, but passed to the husband *jure matriti*. In *Portman v. Willis* (a), it was held, on the authority of a case of 4 Ed. 6. Grants 51., that a leasehold ~~land~~ would not pass by a grant of "omnia bona." That the goodwill was not therefore comprised in the settlement or the decree, and belonged to the husband.

Mr. *Pemberton* and Mr. *Dixon*, for the Plaintiff. The decree was taken in its present form in order to save the expense of taking the account of receipts and payments, and the Master has pursued the direction of the Court according to the spirit and meaning of the decree and of the parties.

The inquiry directed, is not only of the goods, &c., comprised in the settlement, but of those sold, and as the stock in trade consisted of consumable articles, in lieu of, and from the produce of which, others were bought, it was considered that the substituted articles came in the place of those which were sold.

The goodwill depended on the fixtures, furniture, and stock, and not to the house in which the parties had no beneficial interest. If a party assigns all his property

and all benefit thereof, surely the goodwill which is attached to the property passes with it. Suppose the trustees had been called on to account as for a breach of trust, would they not be liable to account for the money received for the goodwill?

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As to the several sums disallowed, the Defendant seeks to charge the trade debts, without accounting for the profits. He is made liable for the stock only, he cannot charge outgoings, unless he gives credit for his receipts.

Mr. *Turner* and Mr. *Elderton*, in the same interest for Mrs. *Barton*, another daughter, and

Mr. *Spurrier* for Mrs. *Davies* the third daughter.

Mr. *Chandless* in reply. The decree only directs an account of the goods comprised in the settlement. If it had been the intention of the Court to charge the Defendant with the substituted goods, it would have been expressly declared by the decree. The goodwill is inseparable from the house, which did not pass by the deed.

*The Master of the Rolls.*

This litigation has taken a course which has somewhat disappointed me. At the hearing, it seemed to be perfectly understood what was best and for the advantage of both these parties, and the accounts were directed with reference to that which was then understood to be, and was the only question between the parties.

This lady, during her widowhood, made a settlement, by which, amongst other things, the stock in trade and

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furniture were assigned to trustees for her separate use, ~~—~~ free from the control of any future husband; at a future period the stock in trade and the other things were to be sold, and the money was to be appropriated to certain uses and upon certain trusts. I think nothing could be more manifest, having regard to the nature of the property thus assigned, than that it never was or could have been intended, that precisely the same articles of which the stock in trade then consisted, were to continue subject to those trusts that were then created. It is impossible to suppose that the publican's stock in trade, as ale, beer, and such sort of things, the only value of which was in their consumption, and which would be entirely deprived of their value if not consumed, were to be preserved in specie so long as the trust continued.

Mrs. *Broad*, having executed this instrument, and being herself in possession of the whole of the property conveyed and assigned by it, intermarried with the Defendant Mr. *Broad*. Mr. *Broad*, if he did not know of the settlement previously to the marriage, did, very soon afterwards, become perfectly well aware of it, and acquiesced in it. I have a strong recollection of there being proof in the cause, of his having, upon more than one occasion, actually resorted to the trust deed, and acted under it. But though he acquiesced in it for certain purposes of his own, he nevertheless, for his own purposes, claimed title against it, and dealt with the property as if it were his own. The business was put an end to in the year 1822, and then the stock in trade was sold. The wife lived some years afterwards, and, upon her death, the persons beneficially interested, subject to her life interest, claimed to be entitled to the benefit of the money arising from this sale, and Mr. *Broad* having resisted their claim, this bill was filed for the purpose of having it established.

**I**t seemed to me perfectly clear, that the persons interested under that trust were entitled to have the benefit of it; and the Defendant having stated in his answer that he had sold the goods and stock in trade for a certain sum and made certain payments thereout, it was certainly a very natural object of every one interested and desirous to see that these persons did not injure themselves by a prolonged litigation in a matter not likely to lead to any benefit to them, that the account there stated should, if possible, be taken to be the account between these parties, and that the matter might be settled on that footing. It would have been very well if it had been so, but not being able to come to an agreement at the time, the decree was made, in the form in which it now is. It is argued that the decree means simply that an account was to be taken of those specific and individual articles assigned by the deed and which had been sold. I am quite certain it was not in the contemplation either of the Court or any of the parties that such could have been the meaning of the decree. The Master has taken an account of the goods, &c. sold in 1822, and states the value as consisting of the sum of money for which they were sold, and on this the difficulty has arisen. He finds "that certain articles which were assigned by the said indenture of settlement, were not included among the articles so sold to the said *Richard Davies*, and that other articles were then sold to him which were not assigned by the said indenture."

That may be perfectly consistent with what was intended, and in this way:— In carrying on the business in the ordinary way, some articles were substituted for others; certain articles being sold, the money arising therefrom was laid out in the purchase of articles of the like kind, and which, as existing from time to time, constituted the stock in trade which was the subject of the trusts of the deed.

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I think that this, in substance, was what was meant:— during the time the trade was carried on, the stock in trade, of necessity, was known to the parties to consist of fluctuating articles, and in the course of the fluctuation, the stock in trade as it ultimately subsisted at the time of the sale, did not consist of the same articles as the stock in trade at the time of the marriage, or when the deed was executed, but still it was the stock in trade which was contemplated by the deed, and was intended to be the subject of the trusts of the deed.

I think, therefore, that it was right in the Master to come to the conclusion which he did on that subject. This applies to the first six exceptions.

As to the ninth exception, the Master has allowed a sum against the Defendant the sum of 210*l.*, being that part of the purchase money which was paid by the purchaser for the goodwill of the trade. Mr. Chandless has experienced a difficulty, which I believe everybody feels, in accurately defining what is meant by the expression, “the goodwill of a trade;” it is not at all easy to do it. Here is a trade carried on upon premises by means of certain stock in trade and furniture, which are by a settlement secured to the separate use of the wife, the husband not being entitled in any way to interfere therein. The business is carried on in a house which has a licence (which licence creates some difference between the goodwill of a publican’s trade and that of other trades), the husband is not to interfere with the furniture or with the stock in trade which is to be for the separate use of the wife, and the wife possesses on those premises, the stock in trade and the furniture; by the use of that, she obtains a certain custom, and the probability of the continuance of that custom. This, in one way of looking at it, is the goodwill. It is the chance or probability that custom will be had at a certain

tain place of business in consequence of the way in which that business has been previously carried on. By this deed that business was to be carried on by the use of the furniture and the stock in trade which belonged separately to the wife, and with which the husband was not to interfere. I must own my opinion is, that the goodwill belonged to the wife, and was a part of that settled property, as annexed and incident to the things which were comprised in the deed, and that whether the particular interest she had in the leasehold premises was distinctly comprised in the deed or not.

As to the other exceptions, I think there are considerable difficulties. The question is not whether a trust of a fluctuating property is to extend to that, which from time to time is substituted for it; but whether such a trust must not be considered as maintained, if the value of the original settled property is kept up.

Here the wife was entitled for her separate use, she might have received the profits of this trade, and either spend them or lay them out in increasing the capital. If she laid out those profits in increasing the capital, which would be for her separate use, could her husband, at any time, have the right to say that the increase of capital should be for his benefit, and not continue for the purpose for which she intended to increase the capital belonging to the trade? Mr. Chandless very forcibly put the case, how would it be as to the wife herself. If the wife herself had received the different sums of money which became due in the course of the business, and instead of spending that money, had thought fit to lay it out upon increasing the capital, would it not have been necessary for her to say, "I intend this increase of the capital as a permanent investment for the benefit of the trust?" I think that is a question of some difficulty.

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## CASES IN CHANCERY.

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v.

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difficulty. I do not think that is quite so clear as it ~~has~~ been considered to be in argument.

There is this specialty in the case, that this increase of capital was not, in point of fact, created by the wife or by her agent, but by the husband claiming, in opposition to the wife and to her exclusion, the possession of this property for his own benefit. Could he, by interfering with the trust property in this way, appropriate to his own use the profits arising from the trade, and if he could not, does it make any difference whether he laid it out in the purchase of additional capital or not? I think there is some considerable difficulty in that question.

The two sums of 178*l.* and 128*l.* require further consideration. The remaining exceptions depend upon Mr. Broad being entitled to charge for the outlay which he has made. It is perfectly clear that if an account had been directed to be taken of profits, he would have had the benefit of that outlay. The injustice which is alleged on his part would cease, if he has been in the receipt of profits exceeding the several sums charged. On the other hand, if all the profits he has received in carrying on the trade have been less than the sums of money with which he is sought to be charged, is that right? I cannot say I think it is.

This brings me to the consideration whether, in point of fact, the decree does do strict justice between the parties, whether by directing an account to be taken of the capital and of the application thereof, you really do that which is necessary to be done before strict justice can be administered between these parties, whether you ought not to take an account of what he has received and paid, charging him with the amount of the receipts and giving him the benefit of payments in the

the shape of just allowances, and taking from him every thing but that which he has expended, and can prove that he has expended. I have some difficulty how to deal with those exceptions, and I think I must look over these papers and take a little time to consider how they are to be dealt with. I think the first eight must be overruled. I cannot dispose of the rest until this cause has been heard on further directions, that I shall then see the whole merits of the case.

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The cause was heard on further directions, when it was, amongst other things, argued that as the suit had become necessary by the conduct of Mr. Broad, he ought to pay all the costs consequent upon the litigation, and, amongst them, the costs of the co-Defendants.

*The Master of the Rolls.*

Dec. 17.

I think that I cannot give any costs of this suit to those who are in the same interest with the Plaintiff. I cannot make the Plaintiff pay for them, and I do not think it is a case in which Broad ought to be called on to pay them over.

Parties in the same interest with the Plaintiff, not joining as Co-plaintiffs, are not entitled to the costs of a suit, which as to their interests is successful.

Trustees neglecting their trust not entitled to their costs.

With respect to the trustees, I do not think they are entitled to costs, because they have utterly neglected their trust, they executed the trust deed, and ought to have taken care that the schedule was annexed; their neglect of that duty having been followed by such very serious consequences, I think it is utterly impossible to give them any costs of these proceedings. There is certainly some doubt with respect to the other points, and I shall be sorry if it should turn out to be necessary to investigate the facts further.

This gentleman carried on the business which was settled on his wife, and the proceeds of which, after keeping

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keeping up the stock, would be at her disposal. She might have consented to her husband's applying the profits to his own use, or she might have said "it shall be laid out in increasing the stock." Under those circumstances, it does not appear to me to be unreasonable to presume that the increase of stock was made by the application of what constituted the profits; but was the increase of stock subject to the trusts of the settlement? That is one way of looking at it. It would be very difficult to permit the husband, who was carrying on this trade, selling the stock, receiving money and applying it in the purchase of other stock in trade, to say, "I have spent so much money in the business, I must be recouped out of the stock." I scarcely know on what principle that could be done. The exceptions as to the sum of 128*l.*, contain an express assertion that he is entitled to be reimbursed for money laid out during the time the trade was carried on. I find very great difficulty in allowing it. Then there is the sum of 178*l.* which he claims as being the value of the increased stock, malt, and things of the sort, got for the purpose of carrying on the business—how can he have that, if the whole of the stock was subject to the trust? There is a difficulty in allowing that.

There are other sums of money, amounting in the whole to 44*l.* 2*s.* 7*d.*, which were debts in the trade and sums of money which he had to pay at a time when it appears he could not, by any means, have been receiving the proceeds of the stock in trade. I confess I feel some difficulty in saying in strictness he might not be entitled to those sums of money. I must, if the parties cannot agree, consider the matter further, and give a decision upon it. Without however binding myself, I think I may say that my impression is against the exception.

ceptions as to the 129*l.* and 178*l.*, and rather in favour of the others, unless it can be shewn the Defendant had *some* means of paying them.

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NOTE.—The case was afterwards compromised.

Another point relating to evidence was raised upon these exceptions, which was as follows:—Mr. *Davies* had been examined in the cause on the part of the Plaintiff, and cross examined by the Defendant *Broad*, but the points to which he was cross-examined by the Defendant did not arise out of his examination in chief.

Upon the enquiries before the Master, two affidavits of Mr. *Davies* were tendered in evidence on behalf of the Defendant *Broad*, but no order of the court having been obtained for leave to examine him upon the enquiries, the Master rejected his evidence, which was also stated to be on points on which he had been previously examined.

Mr. *Chandless* contended that as he had not been examined in chief for the Defendant, an order was not necessary. He cited *Metford v. Peters* (a) in which it was held, that a witness who had been examined before the hearing, may be examined before the Master for the other side without the leave of the court.

Mr. *Pemberton* and Mr. *Dixon* contra contended that the case cited did not apply, for the witness had been examined on the part of the Plaintiff, though nominally he had been cross-examined only. That the ordinary

(a) 8 *Sim.* 630.

A witness was examined for the Plaintiff and cross-examined by the Defendant on other matters. Held, that his further evidence could not be received, upon an inquiry before the Master, except by order of the Court.

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ordinary rule must therefore prevail which was, **that** witnesses examined in the cause cannot be examined **by** the Master without leave of the court.

*Smith v. Althus (a), Willan v. Willan (b), Smith v. Graham (c), Rowley v. Adams (d)* were cited.

*The MASTER of the ROLLS.*

The 7th and 8th exceptions relate to the evidence **re-jected** by the Master, and upon that I have no doubt whatever. The Defendant says that this witness **had** not been examined on his side, and that he was **merely** cross-examined. This however was not cross-examination upon the matters to which the Plaintiff had **ex-amined** the witnesses, but was a direct examination **in** chief, though under interrogatories which were nominally cross-interrogatories. It was a direct examination **in** chief of this witness by the Defendant, to establish his own case, as alleged by the answer; and that **being** so, I am of opinion, according to the ordinary rules **and** practice of the court, not that the witness was **excluded**, but that the Master was not at liberty to examine **this** witness or to receive his further evidence without **the** leave of the Court.

If, subsequent to the time the witness had put in **his** examination to the interrogatories filed in the cause, **it** had been discovered that new evidence could be **given** by him and it was therefore desirable to examine **him**, for the purpose of bringing forward such new evidence in support of the case made by the Defendant, it would have been easy for the Defendant to have applied to the Court, stating and shewing such circumstances as would

(a) 11 *Ves.* 564.

(b) *Cooper*, 291.

(c) 2 *Swan.* 264.

(d) 1 *Myl. & K.* 545.

would have induced the Court to give leave to have that examination, and he might then have had it.

It has been stated, that the Master being of that opinion, gave an opportunity to the party to apply to the Court, which he did not think fit to take advantage of, but he preferred running the risk of succeeding upon exceptions to the Master's report.

The 7th and 8th exceptions must therefore be overruled.

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See *Whilaker v. Wright*, 2 *Hare*, 321.

WATSON v. PARKER.

1843.  
Feb. 16. 22.

THIS case came on upon demurrer to the whole bill for want of equity and for want of parties.

The bill in substance alleged, that a Mr. Oswald married in 1811, and that previous to the marriage, Thomas Shipman, being intimately acquainted with both parties, agreed with them that in the event of the marriage being solemnised he would make such provision for them and their issue as mentioned in the indenture hereinafter stated.

A voluntary covenant is sufficient to support a creditor's suit against the representatives of the covenantor.

A. covenanted with B. to transfer stock into the names of C. and D., or some other person to be named by A.,

upon trust for B., his wife and issue. Afterwards B. became absolutely entitled to the fund. In a suit by B. against the representatives of A. to obtain satisfaction out of his estates in respect of the covenant, Held, that C. and D. were not necessary parties.

That

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That in pursuance of the agreement, *Shipman*, by deed dated the 20th of *August* 1811, after reciting that previous to the marriage he had "promised and agreed that in case such marriage should take place he would make a provision for the said *Sarah Simson* and the issue of such marriage, in consideration of such marriage," he *Shipman*, "for the better confirming the said promise and engagement made by him, and for the making and securing a settlement and provision for the said *Sarah Oswald* and the issue of such marriage, and in consideration of the sum of 10*s.*" &c. "covenanted with *Oswald* and wife, that he would, in his lifetime or by his last will and testament, give, direct, limit and appoint unto the said *Thomas Oswald* and *Sarah* his wife, and *George Lee* and *Joseph Thorpe Shipman*, or unto some other person or persons to be by him the said *Thomas Shipman* in such will or settlement named, the full sum 3000*l.* of 5 per cent. Navy Annanities," upon trust for wife, husband, and the issue of the marriage.

According to the statements of the bill the husband alone became, in the events which happened, entitled to the fund.

*Shipman* died without having performed this covenant; and this, which was a creditor's suit, was instituted against his representatives, to enforce its performance out of the testator's real and personal assets. *Lee* and *Joseph Shipman* were not made parties to the bill.

To this bill, the Defendant, (the executor and devisee in trust of the testator) demurred for want of equity, and for want of parties.

Mr. Steere in support of the demurrer.

By the statute of frauds (*a*) no action shall be brought, whereby "to charge any person upon any agreement made upon consideration of marriage," &c. "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

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~~~~~  
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Previous, therefore, to this marriage there appears to have been no agreement in writing; there was therefore a mere *nudum pactum* which gave no cause of action, *Wain v. Warlters* (*b*); another objection to it is, that the consideration must appear on the face of the agreement.

If no binding obligation existed at the time of the marriage, no subsequent recognition would give it validity. In *Randall v. Morgan* (*c*) a question arose whether a letter written after marriage, sufficiently recognised an agreement before marriage to give a marriage portion; and Sir *W. Grant* observed (*d*), "Supposing, however, that this letter refers to some parol promise before the marriage, I doubt extremely, whether this would be sufficient to entitle the Court to construe this into an acknowledgment of a debt; for the promise being in itself a nullity, producing no obligation, a written recognition, after the marriage, would give it no validity. Otherwise the construction of the fourth section of the statute would be just the same as the seventh, which requires only that a trust shall be manifested by writing. Upon that clause it is not necessary, that the trust shall be constituted by writing. It is sufficient to shew

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(*a*) 29 *Car. 2. c. 3. s. 4.* (*c*) 12 *Ves. 67.*
(*b*) 5 *East, 10.* (*d*) Page 73.

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by written evidence the existence of the trust. But the fourth clause requires the very agreement to be in writing, and signed by the party, to be charged therewith."

The covenant is purely voluntary, and the covenantee would recover merely nominal damages at law: it cannot therefore be made the foundation of a creditor's suit in equity.

Lee, also, to whom the money is to be paid, and who is the legal owner, is a necessary party to this suit.

Mr. C. Hall, in support of the bill.

This is not the case of a voluntary engagement on the part of a stranger: the consideration of marriage is a valuable consideration, and sufficient to support any such agreement.

Whether the agreement prior to the marriage could be enforced or not, still the deed executed after the marriage imports a consideration, and an action at law could be sustained on it, *Tiffnell v. Constable* (a) is the Plaintiff is therefore in equity, entitled to have satisfaction out of the assets.

Lee and *Joseph Shipman*, having no duties to perform, are not necessary parties to the suit; the covenant is not entered into with them, and it is to transfer to them or some other persons, to be named by *Thomas Shipman*.

Mr. Steere, in reply.

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(a) 7 *Ad. & E.* 798.

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As to the demurrer, for want of parties, I am of opinion that it cannot be sustained. I will not decide the demurrer for want of equity, until I have read the case of *Randall v. Morgan*.

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This case stood over, in order that I might have an opportunity of reading the case of *Randall v. Morgan*, which was referred to in the argument. Having read the case, I am of opinion that it has no bearing on the question raised by this demurrer.

By the bill it appears, that the testator, by deed, signed, sealed, and delivered, promised and agreed with *Thomas Oswald* and his wife, that he would, in his lifetime, or by his last will, direct and appoint to certain persons, or to persons to be by him named, the full sum of 3000*l.* 5 per cent. Navy annuities, upon the trusts and for the purposes in the deed mentioned.

By the promise and agreement under seal, a covenant is constituted; but the Defendant contends that the deed was executed without any consideration, and that no damages, or only nominal damages, could be recovered for a breach of the covenant; and therefore they argue, that the Plaintiff cannot sustain a suit framed as this is. There are however several cases in which a breach of covenant to do a particular act has been held to constitute a debt, as in the case of *Musson v. May*(a), Sir *William Grant* held it to be settled, that if a covenant is broken, though the damages are unliquidated,

(a) 3 *V. & B.* 194.

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unliquidated, the covenantee is a specialty credit—~~or~~, and in the case of *Lomas v. Wright* (a), where —~~the~~ the testator had entered into a voluntary covenant to settle certain leasehold and copyhold lands, it was held by Lord Cottenham that the Plaintiffs, who claimed under the covenant, were to be considered as credit—~~ors~~, and that although (as volunteers) they were to be postponed to all creditors for valuable consideration, they were entitled to be paid out of the assets in due order; and it was referred to the Master to enquire into the amount of the damage they had sustained.

I am therefore of opinion that, even supposing the deed to have been voluntary, this bill may be sustained, and that the demurrer must be over-ruled.

(a) 2 *Myl. & K.* 769.

See *Clough v. Lambert*, 10 *Simp.* 174.

Feb. 20, 21, 22.

The ATTORNEY-GENERAL v. FOORD.

Lease of charity property for ninety-nine years, at a fixed rent, containing no contract to repair or lay out any money thereon, set aside.

A building lease of charity property for more than ninety-nine years, cannot stand unless there be some special grounds on which it can be protected.

SOME property at *Whitstable*, was held by trustees of a charity for the poor of the parish.

In 1791, the trustees demised the charity property, consisting of about half an acre of land, a public house called the *Hoy*, and two cottages and a stable, for ninety-years, at a yearly rent of 20s. The demise was expressed

expressed to be made in consideration of a former lease therein mentioned to be cancelled, and of the premises being repaired, but no evidence was given in the cause of that being the fact.

The present value was 60*l.* a year.

This information, filed without a Relator, sought to set aside the lease for ninety-nine years, and also the under-leases which had been granted, but the latter part of the relief was, in the course of the argument, abandoned.

It appeared that during the progress of the suit, Mr. *Foord* died, and his representatives having proposed a compromise of the suit, a petition was presented for the purpose of effecting it; but the trustees of the charity opposed the arrangement, thinking it would be disadvantageous to the charity. In consequence, not only was a bill of revivor filed, but a supplemental bill, stating all the matters as to the compromise, and again putting in issue the very points raised by the original cause.

Mr. Pemberton and Mr. Blunt, in support of the information.

Mr. Turner and Mr. Shebbeare, for the trustees, supported the information. They cited *The Attorney-General v. Kerr* (a), and *The Attorney-General v. Birmingham*. (b)

Mr. Tinney, Mr. Elderton and Mr. Dixon, for the sub-lessees.

Mr.

(a) 2 *Beavan*, 420.

(b) 5 *Beavan*, 91.

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Mr. Kindersley and Mr. Simpson, for the representatives of *Foord*.

The Master of the Rolls.

Upon the real question in this case, I am of opinion [redacted] that the lease of 1791 cannot stand. The only ground [redacted] upon which it was contended that it could be sustained [redacted] was, that it contains certain recitals, which, if true, would [redacted] shew that there was a consideration given for this lease [redacted], a consideration which would have been beneficial [redacted] to the charity. It is not a building lease, and one of the [redacted] rules laid down in this Court has been, that a building [redacted] lease for a longer term than ninety-nine years can [redacted] not stand, unless there be some special ground on which [redacted] it can be protected. This is a lease for ninety-nine years [redacted], containing no covenants to keep the premises in repair [redacted], and no covenants as to laying out any money upon [redacted] them: I am therefore of opinion, that it cannot stand [redacted].

The Attorney-General does not desire to disturb [redacted] the sub-lessees, and therefore they will retain their interest [redacted]. The only question as to them is whether they [redacted] are entitled to costs; I cannot say that I think they [redacted] are entitled to costs; this is not a case in which costs [redacted] can be ordered to be paid out of the charity, and they have [redacted] not made out a case to entitle them to costs as against [redacted] Mr. *Foord*.

There is another question raised with regard to [redacted] the costs, which involves the matter in great perplexity. This cause having been at issue, a proposal was made [redacted] by the representatives of Mr. *Foord* to compromise the [redacted] suit. They were willing to compromise the suit on certain [redacted] terms. The Attorney-General thought, and after all

all that has taken place, I am not sure the Attorney-General was not right, that it would be expedient, and for the benefit of the charity, to stop the litigation, and obtain for the charity the increased rent for the future, together with the costs of the suit, by which means the beneficial objects of the charity would be immediately brought into exercise; but the trustees represented that this compromise would be very disadvantageous; that the value of the property was such, that to accept that increased rent for the remainder of the time would be injurious to the charity. In that state of things it seems to have been absolutely necessary that the matter should undergo some subsequent investigation; perhaps by a reference to the Master to enquire whether it was beneficial; but the course adopted was to bring the cause to a hearing. If publication had then passed, which I suppose it had, witnesses could not have been examined in the original cause without an order; but no such order was obtained, and not only was a bill of revivor filed to bring Mr. Foord's representatives before the Court, but also a bill of supplement, stating all the matters as to the compromise, and putting in issue again those very points raised in the original cause. It has been stated, that these proceedings took place for the purpose of having the decision of the Court on the costs of the petition. I confess, after hearing all that has been said, that I am by no means satisfied that it was at all necessary. It was clearly put in issue in the original information that the value was above 60*l.* a year. The answer stated it was 44*l.* a year. The trustees alleged that the answer was wrong, that if the information were proceeded in, it would establish that the value was greater. All that might have been proved in the original information, and I am very much at a loss to discover on what ground the representatives of Mr. Foord are to be called upon to pay the costs of that proceeding.

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I certainly do not think that it is a sufficient justification of the proceeding, to say that that was necessary for the purpose of bringing the point to a decision. The point in issue was the value, and the question raised by supplemental was the costs of the petition, which might have been determined on the petition being brought on with the cause.

I find some difficulty in dealing with those costs. I think that the right order will be, that the costs of the supplemental information be deducted from the costs of the original information which Mr. Foord must pay, the costs which then remain due to the Attorney-General should be thrown on the charity.

In the present state of the thing, I cannot say the trustees were wrong in suggesting and bringing forward the point. If they had been, they ought to be personally charged with the costs; but I cannot say I think they were.

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See *Attorney-General v. Pargeter, ante*, p. 150.

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## COCKELL v. PUGH.

March 3. 16.

**U**NDER a marriage settlement, the sums of 7694*l.* consols, and 4000*l.*, were vested in *Dampier, Hopkins* and *William Pugh*, upon the usual trusts.

**T**he suit was instituted in 1833, respecting the sum of 4000*l.* only. Pending the suit, *Dampier* and *Hopkins* died. *Pugh*, who survived, had by his answer admitted the trust; he afterwards absconded, and died abroad. He appointed *W. Buckley Pugh* his sole executor, who, as executor of the surviving trustee, being applied to in writing, in August 1842, to transfer the trust fund to the new trustees appointed under the settlement, declined to say whether he would or not prove the will, and stated he would prefer the matter taking its own course.

**A** petition being presented by the parties beneficially interested, it was referred to the Master to ascertain whether *William Pugh* was a trustee of the sum of 7694*l.* within the meaning of the act, and for whom.

**T**he Master found in the affirmative, and a petition was now presented to confirm the report, and that the secretary of the bank might transfer the fund to the new trustees of the settlement.

**M**r. *Rogers*, in support of the petition, relied on *Ex parte Winter* (a), *Ex parte Hagger*. (b)

**M**r. *James Parker* and Mr. *W. H. Clarke*, contra, objected, that the reference to the Master ought not to have been

(a) 5 *Russ.* 284.

(b) 1 *Beavan.* 98.

The executor of a surviving trustee declined stating whether he would or not prove the will, and neglected for thirty-one days after notice to transfer trust stock standing in the name of his testator. Held, that he was a trustee within the 1 *W. 4. c. 60.*, and a transfer was ordered to new trustees.

The Court, if perfectly satisfied, will make an order to transfer under the Trustee Act without a reference.

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been whether *William Pugh* was a trustee, but whether *William Buckley Pugh* was a trustee. They cited, *In the Matter of Anderson.* (a)

Mr. Rogers, in reply.

*The MASTER of the ROLLS.* The objection to the reference is mere matter of form. The reference is made for the satisfaction of the Court, and if the Court is perfectly satisfied of the facts, the order may be made without any reference, or the reference will be confined to those facts only, as to which the Court cannot feel satisfied without a reference.

I will look at the cases cited.

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*The MASTER of the ROLLS* made the order for transfer, observing that there appeared to be no entry in the Registrar's book of the case before Lord *Lyndhurst*.

(a) 1 *Ll. & Go.* 27.

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## Earl NELSON v. Lord BRIDPORT.

April 1. 6.

**C**ERTAIN inquiries had been directed by the decree, and the cause being in the Master's office, the Plaintiff, on the 8th of December 1841, carried in his state of facts, and on the 10th of February 1842, it was decided that evidence should be entered into in support of it.

The Defendants carried in their state of facts on the 29th of April 1842, and on the 6th of July 1842, it stood over to save expense by admissions.

On the 8th of August 1842, the Plaintiff served an order which he had previously obtained for an Interpreter, and on the same day commenced examining his witnesses, whom, at an expense of 720*l.*, he had brought over from Sicily. Having completed the examination, the Plaintiff, on the 23d of January 1843, gave notice of motion to pass publication, but before the motion had been heard, and on the 10th of February 1843, the Defendants carried an amended state of facts into the Master's office, which was permitted by the Master, who, on the 16th of March 1843, certified that a commission was necessary to prove the amended state of facts. On this certificate, an order for a commission was obtained on the same day; and, on the same day, the Plaintiff's motion to pass publication was refused; but the Defendants were ordered to pay the costs.

It was now moved, on behalf of the Plaintiff, that the amended state of facts, the certificate and the order for a commission be rejected, and the subsequent proceedings, or that the Defendant might pay the costs occasioned, was refused with costs.

Where a party takes his state of facts into the Master's office, and obtains leave to examine witnesses and completes the examination, his opponent's state of facts may, at any time before publication, be amended by leave of the Master.

The Plaintiff and Defendant took their states of facts into the Master's office. The Plaintiff completed the examination of his witnesses, and was about to obtain an order to pass publication, when the Defendant, with the Master's permission, carried into the Master's office an amended state of facts. Held, not irregular, and a motion in the alternative to support the Plaintiff.

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a commission might be suppressed, or that the Defendants might be put on terms to pay the Plaintiff's costs of joining in the commission, and of the proceedings under the same and occasioned by the amendments.

Mr. *Tinney*, and Mr. *Gardner*, in support of the motion, contended, that after the Plaintiff had commenced the examination of his witnesses in *August*, it was no longer competent for the Defendants to carry in an amended state of facts, and thus alter the issue tendered by them, and render nugatory the evidence taken on behalf of the Plaintiff, who might have been proceeding under a wrong impression as to the issue raised by the Defendants. They argued that such was the usual practice of the Masters' offices, and in conformity with the rule, that after issue joined no amendment is permitted.

Secondly, they insisted, that if, by the indulgence of the Court, these proceedings were to stand and the Defendants were to retain their commission to examine their witnesses in *Sicily*, they ought to indemnify the Plaintiff the expenses he had been put to, or would be put to, in consequence of the negligence and delay of the Defendants, and who, coming for an indulgence, ought to pay for it. They cited Lord *Clarendon's Orders*. (a)

Mr. *Pemberton Leigh*, Mr. *Turner*, and Mr. *Bowyer*, argued that there was no such rule of practice as that alleged by the Plaintiff, and that until the evidence had been made known, either party was at liberty, with the sanction of the Master, to bring in an amended state of facts, and to proceed to examine witnesses thereon. That if it were otherwise, one party, by due

(a) *Beames' Orders*, 192.

**due** haste, might effectually prevent his opponent from properly bringing forward his case upon the enquiry.

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That it was evident, that the negotiation as to admissions had caused the consideration of the Defendants' original state of facts by the Master, to be postponed and had created the delay; that it was not right that the Plaintiff, who was a party to that proceeding, should now take advantage of the delay.

That the matter was properly within the discretion of the Master, who necessarily possessed an extensive control over the proceedings in his office; and that it did not appear that any extra expense had been or would be incurred by the Plaintiff.

**Mr. Tinney**, in reply.

**The MASTER of the ROLLS.**

This is certainly a very unusual application, and one which does not, on the face of it, appear to me to be very reasonable. Here is a most important and complicated enquiry pending before the Master. Both parties have carried in their respective states of facts, one has examined witnesses, and, before the publication of the evidence, the Master, who has the conduct of this enquiry, has given leave to the other side to amend his state of facts, and has certified as to the propriety of issuing a commission to examine witnesses abroad, for the purpose of enabling the party to prove that amended state of facts, and upon the Master's certificate, an order has been obtained for issuing such commission.

This motion seeks to set aside the amended state of facts and the proceedings subsequent upon it, on the ground

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ground of irregularity. Whether there has been an irregularity or not, is a matter which I certainly should not like to decide on my own judgment, without first enquiring as to the usual practice in the Master's office in that respect.

The Plaintiff's state of facts was taken into the Master's office on the 8th of *December*, and he obtained leave to examine witnesses in the ordinary course. He might have witnesses examined in *London* by procuring the attendance of his witnesses from abroad; but there was nothing to preclude either party from having a commission to examine their witnesses abroad.

No state of facts was brought into the office on behalf of the Defendants Lord and Lady *Bridport* until five months afterwards, namely till the 29th of *April*. Now if the argument were to prevail, that a party is not entitled to amend a state of facts, after the other party has commenced the examination of his witnesses, then as the Plaintiff had commenced the examination of his witnesses on the 9th of *December*, the Defendants would have been precluded bringing in any state of facts at all.

(*The MASTER of the ROLLS* proceeded to state the circumstances of the case, which it is unnecessary to repeat, and proceeded): —

In this state of things, it is asked, in the first place, that Lord and Lady *Bridport* may be precluded from alleging those facts which are necessary to establish their case under the enquiry. Under the circumstances which have taken place in this case, this is utterly impossible, and cannot be seriously thought of. It is then said that all these proceedings are so irregular, that if the Defendants are desirous of being relieved therefrom, they

**they** must pay all the costs ; besides this, it is said **that** there has been very great and very unreasonable **delay** on the part of the Defendants. I shall make some **enquiries** as to the course of proceeding before the **Masters** in these cases before I decide this case ; but if **one** party thinks fit, and finds it for his advantage, in **order** to secure testimony which might or might not be in **danger** of being lost, to commence, with all the **diligence** he is master of, the examination of his witnesses, **is he**, from the moment he commences the examination of **his** witnesses, to be at liberty to preclude his opponents **from** bringing in an amended state of facts, or any state of facts at all, and that, though he has given him no notice **further** than that which is usually given in the course of the **examination**? If he is, we must consider that rule, and the consequences which the Defendants desire to be relieved from.

**A** state of facts may be amended over and over again according to the circumstances of the case. The **Master**, who, upon an enquiry of this kind, has a large **discretion** with which the court is by no means disposed **unnecessarily** to interfere, may consider it necessary for the purpose of conducting the enquiry, and give leave to do it. Then is a party who proceeds with **diligence** and with strict propriety in the examination of **witnesses** for himself, but without any *constat* on the part of the **Master** as to the particular period from which the parties shall be bound by their states of facts, or when the parties are to be considered at issue, and without any intimation to the other side, by examining **witnesses** one day to have a right to preclude his **opponent** from bringing forward an important fact the next **day**? If that be the state of practice, it certainly requires some consideration ; I will enquire, but I have no doubt I must refuse this motion in the terms in which it is made.

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With respect to the costs, I will consider how far the parties may be relieved from the consequences of any irregularity that has occurred. If there is to be a commission, it will be directed for the purpose of giving a real, fair, and *bonâ fide* examination of witnesses to the satisfaction of both parties. Though granted for the benefit of one, still the other party must have the opportunity of attending with all proper facilities.

I am strongly of opinion, that if the Plaintiff in this case is advised that he ought to bring forward a supplemental state of facts, to enable him to give evidence of something of which he was first apprized by the amendment, Justice requires that he should have the opportunity of doing it. If the Defendants bring forward new facts by amendment, the Plaintiff must have an opportunity of meeting them; natural justice requires that he should have that opportunity. Anything contrary to that would seem to be so abhorrent to fair dealing that it could not be allowed.

Both sides are engaged in a contest of great complication and great difficulty, requiring close and exclusive attention for a long time; I do not wonder that the natural zeal which is engendered in the course of this matter should lead to some contest. It has been a great satisfaction to me to have heard from each side testimony to the fair dealing of the other.

I will endeavour to communicate with the Master in the course of to-day, and I will mention the case on Wednesday.

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*Th<sup>re</sup>*

*The Master of the Rolls.*

I have had a communication with some of the Masters, and though I do not find among them a perfect conformity of practice, yet most of them say, distinctly, that there is not the least degree of irregularity in this proceeding, and that it has been quite in conformity with the practice of their offices; though there is some doubt on the part of other Masters, yet they all think that special circumstances may arise, which might make this mode of proceeding perfectly proper.

I have considered the case with all the attention that I could, and I certainly am of opinion, that under the circumstances of this case, it is in conformity with the practice in the Master's office to receive an amended state of facts before publication, and to go into new evidence. The subject was discussed before Lord *Eldon* in a case of *Willan v. Willan*. (a) In that case publication had passed, and on the ground that publication had passed and the depositions had become known to all the parties, he was clearly of opinion, in conformity with what is now the ordinary practice, that there could not be a further examination without special leave of the court; but it does not seem to have been stated by anybody, that there might not, at any time prior to the publication, have been an examination of witnesses, and, as preliminary to such examination, a statement showing the facts which were to be the subject of that examination.

There was a case before Lord *Cottenham*, which has not been reported, which does not bear on this directly, but it certainly shows what is the view taken of these matters. It was a case of an enquiry as to the next of kin,

(a) 19 *Ves.* 589.; and see *Napier v. Staples*, 1 *Molloy*, 228.

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kin, a state of facts had been carried in, witnesses had been examined on both sides, and the examination, as it would appear, entirely brought to a close ; the evidence was not however taken on interrogatories, but on affidavits, which makes a great difference, because the production of every affidavit is the same as publication ; the evidence having been gone through, and the Master being prepared to make his report, another fact was brought forward, and it was said that the parties were not then at liberty to prove it. The Master thought it was too late, and that he ought not to admit any fresh examination. In that state of circumstances application was made to Lord Cottenham, and he referred it back to the Master to review his report, thinking, that under these circumstances, a party ought not to be precluded from bringing forward fresh facts which were material to be enquired into. Certainly the case is not sufficiently similar to make the one an authority for the other, but it shows the view taken in a case of this kind.

On looking at this matter with all the attention I can give to it, I do not find any irregularity in the proceeding, and I must add further in this case, that if in this proceeding there had been a deviation from what might be considered the ordinary practice of the Master's office, I think the special circumstances here were sufficient to justify it. It is perfectly clear to me, that after that meeting of the 6th of July 1842, it must have been in the expectation of everybody, that some further proceedings were to take place with reference to the state of facts brought in by Lord and Lady Bridport ; whether that proceeding was postponed merely for the purpose of seeing whether admissions of documents could be made, or whether it was postponed for the purpose of considering, between the parties, what mode of proof on the subject of the inquiry at large was to be adopted, still

still something, of necessity, was to be done, and if the parties could not come to an agreement respecting it, there must have necessarily been a further proceeding before the Master on the state of facts which was under his consideration on the 6th of *July*. That never was brought under his consideration at all. The other party could not, by proceeding to examine his witnesses, preclude the Master from going into a subject, the consideration of which had been merely postponed, and preclude him from the right to have it further investigated. I think that the matter was left in a state that gave to the other party a right to proceed; and if the Defendants, having that right, found they could proceed with greater advantage by amending their state of facts, I know of no law and no principle of practice that would preclude them from so doing.

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I am of opinion that this motion is entirely mistaken, and I think it must be refused with costs. At the same time justice must be done to the other side; I am not aware that it will be in the least degree necessary for me to make any special order on the subject, but new allegations having been brought forward on the amended state of facts, there must, on that new matter, be a just, fair, and regular litigation between the parties; it being the right of the Plaintiff to put in issue matter proper to meet the allegations now brought forward by Lord and Lady Bridport. I do not think it will be necessary for me to interfere in the matter, but if the Master entertains any scruple, upon an application made here, I should require very strong reasons to induce me to refuse to the Plaintiff liberty to meet those new facts in every way that justice may require.

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April 19. 24.

CATTELL v. SIMONS.

Costs receivable and payable by two parties, ordered to be mutually set off, without regard to the lien of the solicitors.

The Master of the Rolls has jurisdiction to direct costs which have been ordered by the Lord Chancellor to be paid by the Defendant to the Plaintiff to be set off against costs ordered by the Master of the Rolls, to be paid by the Plaintiff to the Defendant. The order may be obtained on motion, and the notice of motion may be given before the taxation.

The Lord Chancellor on the 8th of November ordered the Defendant to pay costs to the Plaintiff, but the order was not completed till the 23d of December. The Master of the Rolls on the 15th of December ordered the Plaintiff to pay costs to the Defendant, and on the 19th the Plaintiff offered to set off the costs. The Defendant in January following issued an attachment for the costs: Held, that the Plaintiff notwithstanding he was in contempt, might, under these circumstances, move to set off the costs.

THIS case, which is reported in a former volume (), now came on upon a motion by the Plaintiffs, that the costs ordered by the Lord Chancellor to be paid by the Defendant to the Plaintiffs might be set off against the costs ordered by the Master of the Rolls to be paid by the Plaintiffs to the Defendant. The circumstances will conveniently appear by the following chronological statement: —

On the 8th of November 1842 the Lord Chancellor ordered the Defendant *Flecknoe* to pay costs to the Plaintiffs.

On the 8th of December the minutes being mentioned to the Lord Chancellor, a motion was directed to be made.

On the 15th of December the Master of the Rolls ordered the Plaintiffs to pay costs to the Defendant *Flecknoe*.

On the 19th of December the Plaintiffs gave notice to the Defendant that they were willing to set off the costs they had to pay against those they had to receive.

(a) 5 *Beavan*, 396.

On the 23d of *December* the minutes of the Lord Chancellor's order were settled.

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On the 11th of *January* following, the Defendant issued an attachment against the Plaintiffs for 10*l.* 16*s.* 4*d.* part of costs under the Master of the Rolls' order.

On the 13th of *January* the Defendant issued a *subpoena* for 24*l.* 19*s.* 8*d.*, the remaining costs under the same order.

On the 14th of *January* the *subpoena* for costs was served on the Plaintiffs, and on the same day the Plaintiffs gave this notice of motion to set-off the costs.

On the 16th of *January* the Plaintiffs' costs under the Lord Chancellor's order were taxed at 38*l.* 14*s.*

Under these circumstances, 35*l.* 16*s.* being due from the Plaintiffs to the Defendant and 38*l.* 14*s.* from the Defendant to the Plaintiffs, this motion was now brought on.

Mr. Teed and Mr. W. T. S. Daniel, in support of the motion.

Mr. Pemberton and Mr. Chandless *contra*, objected, first, that interlocutory costs could not be ordered to be set off so as to defeat the right of the solicitor; secondly, that such an application ought not to be made by motion; thirdly, that the notice of motion could not be given until the amounts had been ascertained by taxation; fourthly, that the Plaintiffs being in contempt, could not be heard in support of a motion; and lastly, that the Lord Chancellor having by his order specifically directed that the costs should be paid by the Defendant to the Plaintiffs, this Court had no jurisdiction to alter or vary that direction.

X 3

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Taylor v. Popham (a), Ex parte Rhodes (b), Wrig~~g~~^g Mudie (c), and Hawkins v. Hall (d) were cited.

Mr. Teed, in reply.

The MASTER of the ROLLS.

Where a party owes another 35*l.* 16*s.* for costs, and at the same time is entitled to receive 38*l.* 14*s.* from him for other costs, nothing would seem more reasonable than that these sums should be set off one against the other. Several objections have, however, been made to this application.

First, that it interferes with the rights of the solicitor, but I have no doubt whatever of the rule, that the right of the solicitor for costs, is not to interfere with the rights of the parties. I have already had occasion to consider the point; and I think the case is reported. (—)

Secondly, it is said, that the application ought not to be made by motion, but I cannot see why the court is not to proceed upon motion; or why the parties are not to be put to the trouble and expense of attachments, and other proceedings, to work out their rights, when there is a plain equity to have the costs set off. If I had been aware of the circumstances when the order was made here, I should, if I had jurisdiction, have ordered the costs to be set off. I am of opinion, that the application is not improper by motion.

Thirdly, it is said, that the Plaintiffs' costs had not been ascertained until after the notice of motion had been given, but I am of opinion, that it was not necessary

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(a) 15 Ves. 72.

(b) *Ibid.* 539.

(c) 1 Sim. & S. 266.

(d) 4 Myl. & Cr. 282.

(e) *Bawtree v. Watson,*

Keen, 713.

~~sary~~ to wait until the amount of the costs had been ascertained.

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The fourth objection is, that an attachment had issued against the Plaintiffs prior to the notice of motion, and that being in contempt, the Plaintiffs cannot be heard. I think, however, under the circumstances, the objection ought not to prevail, seeing that the offer to set off was made on the 19th of *December*, that the Lord Chancellor's order was not ultimately settled until the 23d of *December*, and that the attachment was issued on the 11th of *January*. (a)

The last is the only serious objection, namely, that the order asked for will interfere with the Lord Chancellor's order, and that the Plaintiffs ought to have applied to the Lord Chancellor on the subject, when the matter was before him on the 23d of *December*. It does appear to me, that the Lord Chancellor had jurisdiction over the matter, and might either have ordered the costs to be set off, or have directed that the order should not be carried into execution, until an opportunity had been given to the Plaintiffs to apply; I must reserve the point as to the interference with the Lord Chancellor's order.

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*The Master of the Rolls.*

April 24.

By an order made by the Lord Chancellor, the Defendant was ordered to pay costs (the amount of which has been ascertained to be 38*l.* 14*s.*) to the Plaintiffs. By an order made at the Rolls, the Plaintiffs were ordered to pay costs (the amount of which has been ascertained to be 35*l.* 16*s.*) to the same Defendant.

(a) See *King v. Bryant*, 3 *Myl. & Cr.* 191., and *Wilson v. Bates*, 2*o.* 197.

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The Defendant, who has not paid the ~~38l. 14s.~~ due from him, claims to be entitled to compel the Plaintiffs to pay the ~~35l. 16s.~~ due to him. And the Plaintiffs ask that one set of costs may be set off against the other and that the Defendant may not be permitted to enforce the payment of the costs due to him, without paying the costs due from him.

It appears to me, that in making this application, the Plaintiffs do not seek to vary the order made by the Lord Chancellor in their favour, but claiming against the Defendant the duty of his obedience to that order, and admitting in favour of the Defendant the duty of their own obedience to the order made here, they ask, that the Defendant may not be at liberty to enforce obedience to the order made here, without, on his part, obeying the Lord Chancellor's order, and they offer to accept what is due to them in satisfaction *pro tanto* of what is due from them. They do not ask for the costs of this application, which (under the circumstances to which I adverted at the time when the motion was made), I should not have been disposed to grant. I think that the order must be made to set off the costs due to the Defendant under one order, against an equal amount of the costs due from the Defendant under the other order.

See also *Harmar v. Harris*, 1 Russ. 155. *Taylor v. Cook, Young*, 201

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LLOYD v. CLARK.

April 20, 21.
28.

N this case the common injunction had been obtained for want of answer, restraining the Defendant from proceeding at law on certain negotiable securities.

The answer having been filed, a motion was now made to dissolve the injunction.

Mr. Pemberton Leigh and Mr. Bates, shewed cause.

Mr. Kindersley and Mr. Daniel, in support of the motion to dissolve.

Mr. Pemberton Leigh, in reply.

The MASTER of the ROLLS postponed giving judgment.

The MASTER of the ROLLS.

In this case, the Plaintiff alleges, that the Defendant Mr. Clark has obtained from him several securities for money, to the amount altogether of about 6257*l.* 10*s.*, and by his bill he prays, that it may be declared that the securities were obtained from him by the fraud and imposition of Mr. Clark, and that the same may be delivered up to be cancelled; and that Mr. Clark, and also Mr. Argent, into whose hands one of the securities has come, may be restrained from prosecuting any action

A. B., very soon after coming of age, was induced by *C. D.*, his superior officer, to accept bills for 3000*l.* at two months, for his accommodation, which were handed by *C. D.* to *E. F.*, a money lender, in payment of a debt of 2590*l.* *E. F.*, who was privy to the transaction, afterwards agreed to arrange the renewal of these and another bill for 500*l.* for twelve months in consideration of *A. B.*'s promissory note for 2500*l.* payable in three years, which sum *E. F.* charged for his expence and trouble. *E. F.* was, under the circumstances, restrained till the hearing, from suing for the 2500*l.*

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action against the Plaintiff in respect of the matters question.

An injunction was obtained for want of answer, at the answers being filed, the Plaintiff shews cause upon the answer of *Clark*, why the injunction against him should not be dissolved. It is admitted that, upon the answer of *Argent*, the injunction against him cannot be sustained.

The case appears to be, that before the month of *June* 1841, extensive pecuniary transactions took place between Capt. *Byng* and the Defendant *Clark*, who is a money lender by profession; that Capt. *Byng* had a confidence of the Plaintiff, who was a cornet in a regiment in which Capt. *Byng* was captain; that *Byng* being embarrassed and indebted to the Defendant *Clark*, procured the acceptance of the Plaintiff for his accommodation, and that under these circumstances, the Plaintiff, without any consideration paid to him, was induced, for the accommodation of Capt. *Byng*, his superior officer, and to facilitate *Byng*'s transaction with *Clark*, to accept three bills of exchange for 1000 each, drawn upon him by Capt. *Byng*. These bills were delivered by Capt. *Byng* to Mr. *Clark*. Two of them were dated on the 12th of *June* 1841. The date of the third does not distinctly appear, the bill stating that it was as well as the other two, was dated the 12th of *June* but the answer so stating the matter, as to leave it doubtful and to afford some reason for thinking, that it was dated two or three months earlier, and at a time when the Plaintiff had not attained his age of twenty-one years. However this may be, I think it cannot be doubted, upon the answers and the correspondence, that Mr. *Clark* well knew, that the acceptances had been given by the Plaintiff for the accommodation of Capt.

Byng

Byng. The bills were payable in two months, they amounted together to 3000*l.*, and, according to the answer, the sums due from or payable by Capt. *Byng* to *Clark*, amounted together to 2590*l.*, and thus Mr. *Clark* was to obtain 410*l.* for his discount, or for forbearance for two months.

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In this way, the Plaintiff became liable upon three bills of exchange, amounting in the whole to 3000*l.* He had very recently attained his age of twenty-one years (a), and became alarmed, not only at the responsibility which he had incurred, but also lest his father should become acquainted with his conduct in these matters.

According to the answer, the Defendant *Clark* had negotiated one of the bills for 1000*l.*, and had deposited another of them for the sum of 700*l.*, but the other bill remained in his own hands. He told the Plaintiff, however, that all the bills were out in the world, or were in the hands of *bonâ fide* holders thereof. The Plaintiff became anxious to get in and conceal from his father the bills, all of which he supposed to have been negotiated and to be outstanding, and he offered the Defendant *Clark* any security in his power, if he would get in the bills, and he wished the bills (which he called bonds) to be consolidated into one.

On the same 23d of *June*, on which the Plaintiff expressed his wish that the bills should be consolidated, Mr. *Clark* says, that he advanced to the Plaintiff 450*l.*, and took from him an acceptance for 500*l.*; he has not stated when this acceptance was payable, but from the nature of the dealing, it must have been in a short time.

The

(a) 21st *May* 1841.

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The Plaintiff now, as surety for Capt. *Byng*, whose debt upon this transaction is stated to be several sums, amounting in the whole to 2590*l.*, and as debtor himself to the amount of 450*l.*, had become liable to pay 3500*l.*, and he is said to have been desirous that the securities should be consolidated; *Clark* alleged his trouble in getting in the outstanding bills, and the expense of insurance, and he agreed to extend the time for payment of the 3500*l.* for twelve months. For this agreement and the trouble and expense, he says, the Plaintiff agreed to give him a promissory note for 2500*l.*, payable at the end of three years; and, on the 3d of *July* 184— the Plaintiff gave to *Clark* a promissory note for 350 payable in twelve months, and another for 2500*l.* payable in three years, and a warrant of attorney to confess judgment was signed on the 5th of *July*.

The promissory note for 3500*l.* has been given to the Defendant *Argent*, who is at liberty to sue the Plaintiff upon it; the note for 2500*l.* is in the hands of the Clerk of records and writs for the inspection of the Plaintiff, and the Defendant says, that he is ready to deal with it as the Court may direct.

Not being in the possession of the note for 3500*l.*, and not being able, at present, and professing not to wish to sue on the note for 2500*l.*, it does not appear why, to these sums, the Defendant desires to dissolve the injunction, or how he can reasonably expect that the Plaintiff, whilst he remains liable to the suit of *Argent*, should, as the price of the injunction, pay the sum of 3500*l.* into court; but after carefully reading the answers and the admitted correspondence, I am of opinion, that the injunction as to these sums ought not to be dissolved. The answers appear to me to contain an unsatisfactory account of the transactions: several of

of **the** statements appear to me to be inconsistent with the **correspondence**: it does not clearly appear, but **may** certainly be doubted, whether the Plaintiff was **ever** legally liable to pay one of the acceptances for 1000*l.*, the giving up of which was part of the consideration for the note for 3500*l.*: it appears to me, that upon further investigation, and upon evidence to be taken in the cause, it may not improbably appear, that the **Plaintiff** was induced to give the note, by misrepresentation as to the extent of his previous liability, and by misrepresentation as to the nature and extent of Mr. *Clark's* services, and I think that the fact of the note for 2500*l.* being taken for such a pretended reason, from a **young** man placed in the situation which Mr. *Clark* knew the Plaintiff to be, and acting under the influence of **his** superior officer, for whose accommodation the **whole** transaction was commenced, throws such a suspicion upon it, that the Plaintiff ought to have an opportunity of proving the alleged fraud, before the **Defendant** can be permitted to sue him upon this note.

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April 29.

GREENWOOD v. CHURCHILL.

A. B. was entitled to a legacy, which was charged on real estates devised to *C. D.* *A. B.* by a deed, to which *C. D.* was a party, and which recited that it had been agreed that the legacy should remain on the security of the estate, assigned it to *E. F.* *A. B.*, without the concurrence of *E. F.*, afterwards released the charge upon the estate, and *A. B.* and *C. D.* together afterwards mortgaged the estates, first to Lord *C.*, and afterwards to the Plaintiff, a judgment creditor, who released his judgment.

Held, that the Plaintiff had priority over *E. F.*

A mortgage was made, "subject to prior incumbrances." Held, under the circumstances, that a prior equitable charge was not included, it being unknown to the mortgagee, and it not appearing to have been the intention of the mortgagors to include it.

SAMUEL CHURCHILL the elder, by his ~~will~~ dated the 17th of April 1808, gave to his ~~son~~ *Benjamin Churchill* a legacy of 8000*l.*, to be paid ~~with~~ in twelve months after the testator's death, with interest ~~at~~ 4 per cent. in the meantime, and he charged all ~~his~~ real estates in *Doddington* with the payment of ~~that~~ legacy. Subject to the charge, the estates in *Doddington* (which were said to comprise *Clifton*) were ~~devised~~ to *Samuel Churchill* the son in fee.

The testator died in April 1808. The will was proved by *Samuel Churchill* the son, who was sole executor; and in October 1809, *Benjamin Churchill* being entitled to receive the legacy of 8000*l.*, and being about to marry *Eliza Harriot Frome*, an indenture of settlement, made between *Benjamin Churchill* of the first part, *Eliza Harriot Frome* of the second part, *Theodosia Frome* of the third part, *John N. Fazakerly* and *John Churchill* of the fourth part, and *Samuel Churchill* of the fifth part, was executed by the several parties thereto; and thereby, after reciting the will of *Samuel Churchill* the elder, and that the legacy of 8000*l.* was unpaid, and that in respect thereof, *Samuel Churchill* had agreed to pay interest ~~at~~ 5 per cent., in lieu of interest at the rate of 4 per cent. as directed by the will; and that upon the treaty for the intended marriage between *Benjamin Churchill* and *Eliza Harriot Frome*, and for the considerations there in mentioned,

ntioned, the said *Benjamin Churchill* had proposed and agreed to settle the sum of 6000*l.*, part of the legacy of 8000*l.*, (which it had been agreed should remain at interest upon the security of the estates of the late *Samuel Churchill*, and then of *Samuel Churchill*, party to the indenture, charged therewith), upon the trusts in the indenture mentioned, it was witnessed, that *Benjamin Churchill* assigned 6000*l.*, part of the legacy of 8000*l.*, to the trustees, on the trusts of the settlement, and the letter to enable them to recover the 6000*l.*, they were appointed the attorneys of *Benjamin Churchill* for the purpose.

The legacy was not paid, and under the circumstances aforesaid, by the will of the testator, and the agreement of the devisee, the devised estates were charged with and remained as a security for the payment.

Samuel Churchill the devisee, having become embarrassed in his circumstances, executed indentures of the 7th and 18th days of *July 1826*, made between himself of the one part, and *Benjamin Churchill* and *James James* of the other part, and he thereby conveyed his freehold estates, *subject to the incumbrances affecting the same*, to *Benjamin Churchill* and *James James*, in fee upon trust to sell the same, or raise money by mortgage hereof as therein mentioned.

Whilst this deed was in preparation, Mr. *James* discovered, that the legacy of 8000*l.* to *Benjamin Churchill*, and another legacy to the like amount to *John Churchill* had not been paid, but remained as charges on the estate of the testator *Samuel Churchill*, and he thereupon required that releases should be obtained; and accordingly, and without any reference to the settlement of *October*

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1809, by indentures respectively dated the 14th and 15th of July 1826, those legacies were released by ~~James~~ Churchill and Benjamin Churchill respectively.

Under these circumstances, and on the 8th of August 1826, Benjamin Churchill and James James executed a mortgage of the estates to Lord Carrington, to secure to him the payment of 5000*l.*, and the legal estate was now vested in him.

Samuel Churchill and Benjamin Churchill, being parties to the settlement, were aware of it, but it was said, that Mr. James did not know of it till towards the end of September 1826.

During these transactions, Samuel Churchill was indebted to the Plaintiffs or to Mrs. Greenwood, in the sum of 2200*l.*, to secure the payment of which, he executed a bond, dated the 24th of April 1826, and the condition of the bond being broken, Mrs. Greenwood commenced an action against him, and in or as of Trinity term, 1826, obtained judgment against him for the sum of 2273*l.* and costs of suit, and thereupon, Samuel Churchill and his trustees Benjamin Churchill and James James, for the purpose of preventing execution on the judgment, proposed to Mrs. Greenwood to execute to her a mortgage or security on the estates in question, if she would acknowledge satisfaction upon her judgment. This proposal was accepted, and thereupon, an indenture, dated the 27th of October 1826, and made between Benjamin Churchill and James James of the first part, Samuel Churchill of the second part, and Mrs. Greenwood of the third part, was executed by the parties thereto, and Benjamin Churchill, James James, and Samuel Churchill, subjected and charged the estates, which, by the indentures of the 17th and 18th of July 1826, were

conveyed to *Benjamin Churchill* and *James James* (but subject and without prejudice to the incumbrances affecting the same estates respectively), to and with the payment of the sum of 2200*l.* to *Mrs. Greenwood*, with interest at the rate of 5 per cent.

In this state of things, a suit being instituted by *Mrs. Greenwood*, it was referred to the Master to ascertain the priorities.

The Master, by his report dated the 24th day of November 1841, found that the Plaintiff *Mrs. Greenwood*, in respect of the principal and interest due to her as in the report mentioned, was entitled to a first charge upon the estates mentioned in the fourth schedule to his report.

To this finding an exception was taken by *John Nicholas Fazakerly* and *John Churchill*, the trustees of the settlement made on the marriage of *Benjamin Churchill*, who alleged, that the Master ought not to have found that the Plaintiff *Mrs. Greenwood*, in respect of the principal and interest due to her as in the report mentioned, was entitled to a first charge upon so much of the estates mentioned in the fourth schedule as were situate in *Doddington* and *Clifton*, because, as they said, by the settlement, they were entitled to a charge prior to that of *Mrs. Greenwood* upon such parts of the estates mentioned in the fourth schedule as were situate in *Doddington*, and also upon such parts thereof as were situate in *Clifton*, and were, at the time of the death of *Samuel Churchill* the elder, parts of his estate.

The question therefore was, whether the charge of the trustees or that of the Plaintiffs had priority.

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Mr. *Kindersley*, Mr. *Turner*, and Mr. *Calvert*, in support of the exception. Assuming the effect of *Berjamin's* release to have been this:—that as between the trustees of his settlement and a subsequent incumbrance for valuable consideration without notice obtaining the legal estate and relying on the validity of such release the latter would prevail, still that principle will not affect the present question. Here neither party has the legal estate, both have mere equities, and therefore that which is prior in time is prior in charge. The legacy was charged on the estate both by the will and the settlement. The owner of the estate, who was a party to the settlement, contracted to give an equitable charge on it, and the assignment afterwards executed by *Berjamin* could not prejudice the rights of the trustees; it could not have a more extensive operation than the first assignment. The charge of the trustees was originated in 1808, that of Mrs. *Greenwood* in 1826; the former must therefore have priority.

Again the Plaintiff took “subject to prior incumbrances,” and consequently subject to the equitable charge of the trustees. Besides this, she had notice of their charge, or must, in equity, be assumed to have had notice of it, for if she had made due inquiry, she would necessarily have been led to a knowledge of the interest claimed by the trustees.

Mr. *Pemberton* and Mr. *Cole*, *contra*, for the Plaintiff.

This is not a case in which the parties have an equal equity; the equity of the trustees is inferior to that of the Plaintiff.

The legacy was only an incumbrance in the event of the personal estate proving deficient, and until that fact had

had been established, *Benjamin* had no right to resort to the real estate for payment. The assignment to the trustees was, at law, a mere nullity, the interest could not at law be passed by an assignment, and after its execution, *Benjamin* still remained the only person who, at law, was entitled to receive the legacy, to give a discharge, and to release the estate. He effectually released the estate, and *Samuel* became, at law, the absolute owner. A mortgage was then executed to Lord *Carrington*, which is admitted to be the first charge; the Plaintiff who had a legal charge by judgment affecting the estate, and on which she might have taken the estate in execution, gave it up for a mortgage of the equity of redemption of that estate which remained after satisfying Lord *Carrington's* mortgage, namely, of an estate discharged of the legacy.

The Plaintiff has what is equivalent to a declaration of trust of the parties who are entitled to the equity of redemption of an estate discharged from the legacy. Where equities are equal, time decides priorities, but where one has got in the legal estate, or an assignment of a term, or a declaration of trust, or any thing equivalent, his right will prevail.

It is said the Plaintiff takes subject to the trustees' claim, because she took "subject to prior incumbrances," but was this legacy an incumbrance? Had it not been legally released? It is clear also that it was not in the contemplation of either party.

Mr. *Geldart* for other parties.

Mr. *Kindersley* in reply. Both parties have mere equities, the Plaintiff has no greater right to call for the legal estate than the trustees. It is said that the

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charge could not be assigned but has been release—d. If the charge was equitable, it could no more be release—d than assigned.

The judgment only affected the interest of the owner—er, and it has been released.

The following authorities were referred to during the argument: *Jones v. Jones* (a), *Beckett v. Cordley* (b), *Wilkes v. Bodington* (c), *Ex parte Knott* (d), *Frere v. Moore* (e), *Jones v. Smith* (g), *Evans v. Bicknell* (h), *Willoughby v. Willoughby*. (i)

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April 29. *The MASTER of the ROLLS.*

The question is, whether the trustees of the settlement of 1809 or the Plaintiffs, in respect of their several charges, are entitled to priority of charge upon the estate.

For the exception to the report it is said, on behalf of the trustees of the settlement, that by the will of the testator, and also by the agreement of *Samuel Churchill* the devisee, the legacy was charged on the estates, and that the charge was never released, *Benjamin Churchill* having assigned his interest before he executed the release in July 1826: that Mrs. Greenwood had no claim against the estate till October 1826, and that she then acquired a merely equitable charge, which was subject to all prior incumbrances affecting the estate: that the legal estate is now vested in *Lord Carrington*, (and which

|                            |                           |
|----------------------------|---------------------------|
| (a) 8 <i>Simons</i> , 633. | (e) 8 <i>Price</i> , 475. |
| (b) 1 <i>B. C. C.</i> 353. | (g) 1 <i>Hare</i> , 43.   |
| (c) 2 <i>Vern.</i> 599.    | (h) 6 <i>Ves.</i> 174.    |
| (d) 11 <i>Ves.</i> 609.    | (i) <i>Ambler</i> , 282.  |

hich the claimant of a merely equitable charge cannot  
isturb,) subject to one equitable charge vested in the  
ustees, and another vested in Mrs. *Greenwood* : and  
at the common rule, “*qui prior est tempore potior est  
re*,” must be applied, unless something has occurred  
disentitle the first in time to the preference.

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There is a question of form, the exception suggesting
at the Master has given to Mrs. *Greenwood* priority in
espect of both *Doddington* and *Clifton*, whereas, in
act, he has only given her priority in respect of so
uch of *Doddington* as was not *Clifton*, and there being
o exception to that part of the report, which finds the
rustees to be second incumbrancers on *Doddington* ;
nd a question was raised, whether any of the estates in
he fourth schedule were derived from *Samuel Churchill*
he testator; but, in substance, the question seems to
e, whether the trustees and Mrs. *Greenwood* can be
aid to have equal equities upon the estate or equity of
redemption vested in the trustees of the indentures of
the 17th and 18th of *July* 1826. If they have, the
trustees, claiming under a security prior in time, may be
entitled to the advantage.

The legacy, as such, was charged on the land, and, in defect of the personal estate, might, at the suit of the legatee, have been raised out of the land after the testator's death; by the settlement, *Samuel Churchill*, the devisee, agreed that the legacy should remain on the security of the land, and after a long period of time, *Benjamin Churchill* the legatee, who had indeed assigned the legacy, but at law remained entitled to receive or release it, did actually execute a deed, whereby the land was purported to be released from the legacy; and, in this state of things, *Samuel Churchill* conveyed the legal estate to his trustees; the mortgage to

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Lord Carrington was executed by them, and it is admitted, that Lord Carrington's charge has priority over the claim of the trustees of the settlement. Lord Carrington's mortgage left the equity of redemption in Benjamin Churchill and James James, and they having the equity of redemption, gave the equitable charge to Mrs. Greenwood.

Mrs. Greenwood, therefore, claims, as against those trustees and Samuel Churchill, who acquired their title to convey free from charges by the release of Benjamin Churchill the legatee; her claim is upon the estate which was vested in Samuel Churchill's trustees after the execution of the release, or upon the equity of redemption which remained with them after the mortgage to Lord Carrington, and although it appears to me, that the execution of the release was fraudulent as against the persons entitled under the settlement, yet the equity to have a charge upon the estate could not be made available, without first establishing an equity to set aside the release, and it would seem, that the trustees of Samuel Churchill, who had actually contracted to give the security to Mrs. Greenwood, could not have resisted his demand to have the money raised out of the equity of redemption, though they might have resisted the claim of the trustees of the settlement, calling upon them to raise the legacy which had actually, however improperly, been released. Whilst that release remained in force, Benjamin Churchill the legatee, who had himself released, could not, for his own assignees, set up the claim to be paid in priority to a bona fide claimant on the equity of redemption.

The right to the legacy was to be made out through him. He had released the legacy, and he and his trustee had entered into a contract with Mrs. Green-

wood

ood to give her the benefit of a charge, and she having judgment, was, on the faith of that contract and of the state supposed to be vested in *Benjamin Churchill* and *James James*, induced to enter satisfaction on the judgment, in consideration of the charge which she received ; and it does not appear to me that the trustees of the settlement, who were to claim through the assignment of *Benjamin*, could, whilst the release of *Benjamin* remained unimpeached, establish any priority before Mrs. *Greenwood*. The trustees, under the deeds of *July 1826*, had the legal estate till they executed the mortgage to *Lord Carrington* ; after that, they had the equity of redemption. They then engaged to hold the estate as security for Mrs. *Greenwood*, and in that way, it appears to me, they gave her a preference.

I think also that the argument founded on the words, "subject to prior incumbrances," cannot prevail. The settlement was not known to Mrs. *Greenwood*. The release of the legacy by the legatee had actually been executed, and was, or might have been known. It is, I think, clear, that the trustees of the deeds of *July 1826* did not intend to include the unpaid part of the legacy amongst the "prior incumbrances," and I think that the words do not deprive Mrs. *Greenwood* of her right.

Overrule the exception.

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April 28, 29.  
May 8.

## SADLER v. LEE.

*A., B., and C.* executed to a banking firm, consisting of *E., F., and G.*, a power of attorney, empowering them "jointly and severally" to receive the dividends and to sell out the stock itself. The power was sent by the bankers to their broker, who deposited it with the Bank of England. *F.* alone clandestinely sold

**I**N the beginning of the year 1825, the Plaintiffs and Mr. Lucas, who had died since, being entitled to the sum of 11,813*l.* 0*s.* 2*d.* 3*½* per cent. annuities, then standing in their names as trustees, were desirous that the dividends should be received through the agency of Messrs. Sparks and French, who then carried on the business of bankers, in partnership together, at *Guildford*. The firm of Sparks and French consisted of *Richard Sparks, William Sparks, and John French*, and on the 29th of January 1825, the Plaintiffs and Lucas executed a power of attorney, whereby they empowered *Richard Sparks, William Sparks, and John French*, jointly and severally, not only to receive the dividends of the stock, but also to sell the capital. Sparks and French, by the ~~29th~~ London

out the stock, but the firm had credit for the proceeds. The sale was concealed, and the amount of dividends for some time accounted for. Held, that *E.* was liable for the sale, though it had taken place after the death of *C.* and *G.*; and that *he* would have been equally liable, though the proceeds had not been placed to *the* credit of the firm.

Upon a question whether one partner had notice of the irregular course of dealing of his co-partner, to the prejudice of their customer, the Court was of opinion, that he ought to be deemed to have known the facts, it appearing from the evidence, that if he had used ordinary diligence and attention in the management of the business, he might and must have discovered all the material facts: that the means of knowledge were within his power: that he would, with very little trouble, have found confusion and irregularity in the accounts, a proper investigation of the sources of which would have led to discovery of all that had been done. Held also, that under such circumstances the Court, for the protection of those who deal with partnerships, must impute the knowledge which the partners, acting for their interests and in discharge of their plain duty, might and ought to have obtained.

Difficulty in holding a partner who ostensibly takes an active part in the conduct of the business free from responsibility, on the ground of insanity, in respect of the acts of the firm.

Confirmed and incurable insanity is a ground for dissolving a partnership, but mere diminution of capacity in attending to it is insufficient for that purpose.

Bankers of trustees wrongfully sold out stock and applied it to their own purposes. Held, that the measure of their liability was the amount paid in replacing the stock.

*London* agents and correspondents, according to the power, received the dividends, and although *French* died in 1828, and *Anthony Lee* was taken into partnership with *Richard Sparks* and *William Sparks*, and the firm hereupon became *Sparks and Lee*. Although *Richard Lucas* died in 1830, the new firm, first on behalf of the original trustees, and afterwards on behalf of the Plaintiffs the surviving trustees, continued to act under the power of attorney, and, by the persons named in the power and the agents of the firm, continued to receive the dividends, and apply them according to the directions of the trustees. It did not appear that there was any irregularity or misconduct till the month of November in the year 1832.

The power of attorney itself was, on the 1st of February 1825, sent by the firm of *Sparks and French* to Mr. *Peppercorn*, their broker in *London*, and was by him deposited in the proper office of the Bank of *England*, where it remained. On the 23d of November 1832, Mr. *Peppercorn*, by the direction of *William Sparks*, sold, and *William Sparks*, under the power, transferred the sum of 2500*l.*, part of the trust stock, for the sum of 2297*l.* 7*s.* 6*d.*, which he paid, with other sums, into the bank of *Esdailes and Co.*, who were the correspondents in *London* of *Sparks and Lee*, to the credit of that firm. Again, on the 28th of December 1832, Mr. *Peppercorn*, by the direction of *William Sparks*, sold the sum of 3406*l.* 10*s.* 1*d.*, further part of the trust stock, for the sum of 3151*l.* 0*s.* 4*d.*, which was partly applied by *Peppercorn* to the use of *Sparks and Lee*, and as to the rest, was paid to *Esdailes and Co.* to the credit of *Sparks and Lee*. And again, on the 29th of October 1834, Mr. *Peppercorn*, by the direction of *William Sparks*, sold the sum of 5056*l.* 17*s.* 10*d.*, further part of the trust stock, for the sum

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sum of 5000*l.*, which he paid to *Esdailes and Co.* to ~~the~~ the credit of *Sparks and Lee.*

The several sums of stock thus sold amounted in ~~the~~ the whole to the sum of 10,963*l.* 7*s.* 11*d.* and the sum of 10,388*l.* 7*s.* 10*d.* cash was the aggregate of the ~~proceeds~~.

The several sales were, it was said, personally ~~di~~ rected by *William Sparks* alone, but they were effected under the power which was confided to the firm ~~of~~ of *Sparks and French*, the business of which was assumed and continued by the firm of *Sparks and Lee*. They were effected by the broker employed by that firm, and the proceeds were by him, after deducting half of ~~the~~ the usual commission, paid to the credit of the account subsisting between *Sparks and Lee* and their *London* correspondents. The firm had credit for the proceeds in that account, and the entries in the accounts of the *London* correspondents indicated that the several sums thus placed to the credit of the firm were received "per Mr. *Sparks*."

After the several sales as well as before, sums, equal to the full amount of the dividends of the whole of the trust stock, 11,813*l.* 0*s.* 2*d.* 3*½* per cent. annuities, were dealt with, according to the directions or authority given to the firm of *Sparks and Lee*, by the Plaintiffs or their solicitor, and thus the Plaintiffs and the persons interested in the stock were induced by the firm of *Sparks and Lee* to believe, that the stock continued safe. Nothing occurred to afford to the Plaintiffs the least intimation that any part of the stock had been sold.

In the month of *June* 1838 *Richard Sparks* died, having disposed of his real and personal estates by will and codicils. *William Sparks*, who was residuary legatee and

nd executor of *Richard*, proved his will, and after the eath of *Richard Sparks*, the banking business was caried on by *William Sparks* and *Lee*. *William Sparks* ied on the 24th of October 1840, and soon after his eath, it was discovered that the stock had been sold.

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This bill was filed on the 16th of November 1840, and prayed, in substance, for a declaration that the real and personal estates of *Richard Sparks* and *William Sparks* were liable, in equity, at the respective times of their deaths, to replace the sum of 10,963*l.* 7*s.* 11*d.* 9*½* per cent. reduced annuities, or at the option of the Plaintiffs, to make good to them the amount of the proceeds of the sales, and the amount of so much of the dividends as had not been accounted for. The bill alleged *Lee* to be insolvent, and he had since become bankrupt.

The persons who claimed under the will of *Richard Sparks* were the principal Defendants, and it was alleged by them, in opposition to the Plaintiffs' claim, 1st, that as the power was joint and several, the partners were not collectively answerable for the use which might be made of it by any one of them. Each being enabled to act upon the power, in the absence of collusion, no other was answerable for what he did. Secondly, that if they were originally answerable in the character of partners, they ceased to be so on the death of *French*, and that afterwards, the surviving partners *Richard* and *William Sparks* ceased to be answerable for each other. Thirdly, that *Richard Sparks* did not know, and had not the means of knowing, that the stock was sold, or that the money, now appearing to have arisen from the sale of the stocks, was paid to the credit of the firm, and that if he had been informed that *William Sparks* had paid any such sums of money into *Esdailes and Co.*, he did not know,

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know, and had no means of knowing, that the money was not the separate property of *William Sparks*.

Mr. Pemberton Leigh and Mr. Freeling for the Plaintiffs.

Mr. Turner, Mr. Tinney, Mr. Teed, Mr. Goodeve, Mr. Shebbeare, and Mr. Colvile, for the Defendants.

The following cases were cited: *Stone v. Marsh* (a); *Marsh v. Keating* (b); *Ex parte Apsey* (c); *Ex parte Heaton* (d); *Bevan v. Lewis* (e); *Smith v. Craven* (g); *Hume v. Bolland* (h); *Devaynes v. Noble* (i); *Gray v. Chiswell* (k); *Wilkinson v. Henderson* (l); *Vulliamy v. Noble*. (m)

May 8.

The Master of the Rolls.

The facts of this case are many of them very similar to those which occurred in *Marsh v. Keating* (b), the material difference being, that in this case, *William Sparks* caused the stock to be sold under a legal and valid power of attorney, whereas in the case of *Marsh v. Keating*, *Fauntleroy* caused the stock to be sold under a power of attorney which was forged. It was argued that there was another material difference, inasmuch as, in this case, the trustees and the Plaintiffs were not the regular customers of *Sparks* and *Lee*, whereas in *Marsh v. Keating*, *Mrs. Keating* was the regular customer of *Marsh* and Co. I do not know that any such supposed difference would be material, but I am of opinion, that with

(a) 6 B. & C. 551.	(h) 1 Cr. & M. 130.
(b) 8 Bl. 651.; and 2 Cl. & Fin. 250.	(i) Clayton's Case, 1 Mer. 572.; 2 R. & M. 495.
(c) 5 Bro. C. C. 265.	(k) 9 Ves. 118.
(d) Buck. 586.	(l) 1 Myl. & K. 582.
(e) 1 Sim. 576.	(m) 3 Mer. 593.
(g) 1 Cr. & Jer. 500.	

with regard to this stock and the receipt and application of the dividends payable thereon, *Sparks* and *Lee* must be deemed to have been the bankers of the trustees. There can, I think, be no doubt, but that the trustees constituted *Sparks* and *French* their attorneys and agents in this matter, because it was in the way of their business as bankers to transact such business, and that it was for the same reason that the Plaintiffs continued to permit *Sparks* and *Lee* to act for them; I think also that the relation which subsisted between the firm and the Plaintiffs, was precisely the relation subsisting between bankers and their customers who have given to the bankers powers of attorney to receive dividends and sell stock.

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Now in *Marsh v. Keating*, the Judges state the facts, as appearing by the special verdict, to be, that the broker paid the money, the produce of the stock deducting one half of the usual commission, by a cheque payable to *Marsh* and Co., into the hands of *Martin* and Co., the city agents to the account of *Marsh* and Co., and they observe, that at the precise time of such payment, there can be no doubt that it was as much money under the control of *Marsh* and Co. as any other money paid to *Martin* and Co. by any customer under ordinary circumstances. The house of *Marsh* and Co. might have drawn the whole of the balance into their own hands. If the same money had been paid to *Martin* and Co., as the produce of the Plaintiffs' stock, under a genuine power of attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiffs, and would not less be money received by the partners of the firm, because it was entered in the account as "cash per *Fauntleroy*." It appeared, in *Marsh v. Keating*, that *Fauntleroy* had deceived his partners, but the Judges held that his fraud afforded no answer

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to the Plaintiffs' claim after the money once came ~~into~~ to their power.

But in the present case the distinguishing and important facts are, that the power of attorney was genuine, and was intrusted to the joint care of three partners. It enabled each to act severally after it was removed from their joint custody, and placed in the hands of their joint agent without special directions, or after it was deposited in the proper office, without which, the dividends, the receipt of which was the object of the trustees, could not have been received; but it was optional with the bankers, collectively, whether they would accept the power and assume the responsibility. They did assume it, as it appears to me, in the ordinary course of their business; having done so, and having ~~sent~~ it to their broker, to be acted upon in the way most suitable to their own convenience, I am of opinion, that they all became answerable for the several acts of each other under the power, and I think that all the partners would have been answerable for the sale by the direction of *William Sparks*, even if the money had not been paid to the account of the firm with the *London* bankers.

Under these circumstances it is less important to consider, whether *Richard Sparks* ought to be deemed to have known the facts which are now established, but I am of opinion, upon the evidence produced, that *Richard Sparks*, if he had used ordinary diligence and attention in the management of the business, might and must have discovered all the facts which are material to this case; the means of knowledge appear to me to have been in his power; he would, with very little trouble, have found confusion and irregularity in the accounts, and a proper investigation of the sources of such confusion and irregularity would have led to the discovery of all that

that had been done. In such a case as this, and under such circumstances, courts of justice, for the protection of those who deal with partnerships, must impute the knowledge which the partners, acting for their interests and in discharge of their plain duty, might and ought to have obtained.

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It is said, indeed, that *Richard Sparks* had become imbecile, and that although he regularly attended at the bank, and took a small share in the management of the business, was yet incapable of investigating or understanding the state of the affairs, especially as *William Sparks* used constant endeavours to conceal the transactions from him. The evidence upon this subject is by no means satisfactory. If it were much stronger than it is, I own that I could not conclude from it, that a man, ostensibly taking an active part in the conduct of such a business, could be held free from responsibility in respect of the acts of the firm in which he was a partner. Confirmed and incurable insanity is a ground for dissolving a partnership, but I apprehend that, before a decree can be made that a partnership shall be dissolved on this ground, it must be shewn, not merely that the party alleged to be insane, is not, for the time, so capable as he may previously have been of attending to or conducting the business, but that he is really insane. (a) If not, the partnership cannot be dissolved on that ground, and his responsibility continues. But in this case, the evidence has failed to shew, that at the times when the sums of stock were sold, *Richard Sparks* was, in any respect, incapable of investigating or understanding the accounts, or of managing the business. And, on the whole, I am of opinion, that *Richard Sparks* and *William Sparks* were, at the respective

(a) See *Kirby v. Carr*, 3 *Yonge & Col.* 184.

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respective times of their deaths, indebted to the ~~Pla~~ in-
tiffs in respect of their transactions.

The next question is, what is the amount of the ~~debt~~, or how it is to be ascertained. The bill prays, that it may be declared that the real and personal estates of *Richard* and *William Sparks* are liable to replace ~~the~~ stocks sold out; or, at the option of the Plaintiffs, to make good the amount of the proceeds of the sales. (a) The Defendants representing the estates of *Richard* and *William Sparks* say, that if they are subject to ~~any~~ liability, it can only be to the extent of the monies actually received, for that the bankers were agents ~~only~~ and not trustees, and cannot be answerable as such, especially in the absence of the *cestuis que* trust. To which it is replied, that though the bankers were ~~not~~ trustees, the Plaintiffs are entitled to damages, and that the value of the stock at the date of the decree is the right measure of the damage. I think, that there is nothing in this case, or in the form of the pleadings, to prevent the Plaintiffs from demanding against the Defendants a full pecuniary compensation for ~~the~~ loss they have sustained by the improper sales of stock, but it does not appear to me that they are entitled to have the stock specifically replaced. The bill alleges that the Plaintiffs, being trustees for other persons, are bound to make good, and intend to make good, the loss which would otherwise be sustained by the *cestuis que* trust, and that the *cestuis que* trust have elected to treat the Plaintiffs as their debtors, and not to make ~~any~~ claim against the assets of the firm, or the estates of the *Sparks*. I think that the loss sustained by the Plaintiffs is to be measured by the amount of ~~money~~ which they have properly paid in replacing the stock,

or,

(a) See *Watts v. Girdlestone*, ante, p. 188.

otherwise satisfying the just claims of the *cestuis que-
st*. The Plaintiffs state that they have replaced the
stock, but I do not understand that there is any proof
of it.

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Inquire what sums of money have been properly laid out and expended by the Plaintiffs in replacing the sum of 10,963*l. 7s. 11d.* per cent. annuities; and declare that the estates of *Richard Sparks* and *William Sparks* are liable to make good to the Plaintiffs the full amount of such several sums of money, together with the amount of so much as has not been accounted for, of the dividends on such annuities, which ought to have been received up to the time when the same were replaced.

BAKER v. THURNALL.

May 11. 27.

MR. *SHAPTER*, on behalf of the Plaintiffs, moved, that they might be at liberty to examine the Defendant *Barker* as a witness, saving all just exceptions, and without withdrawing the replication filed to his answer. He urged, that although an order of course for such a purpose was not regular, still that such an order may be made on special application to the Court.

Application to the Court to examine, on behalf of the Plaintiff, a Defendant, to whose answer a replication had been filed, refused.

The Master of the Rolls.

The general rule is, that you cannot examine as a witness a Defendant to whose answer you have filed a replication. By filing a replication you admit that he has an interest which you are contesting in the cause. You had better see if there are any authorities on the subject.

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 May 27.

Mr. Shapter now referred to the case of *Crookhall v. Smith* (a), where a Defendant, as executor, and not in his own right, was ordered to be examined as a witness to prove the execution of deeds, &c., his answer being replied to.

The MASTER of the ROLLS.

That case only applies to the proof of documents. I have understood the rule to be universal, that if you desire to examine a Defendant you must, as to him, withdraw the replication. I cannot introduce a new rule.

(a) 2 *Fowler's Practice*, 101. of *Arundel*, 4 *Beavan*, 155. *Rose*
 See *Holmes v. The Corporation v. Clarke*, 1 *Y. & C. (C. C.)* 539.

NOTE.—By the 6 & 7 Vict. c. 85. a Defendant may now be examined on behalf of the Plaintiff or Co-defendant.

May 11.

EDMONDS v. NICOLL.

Liberty for the Plaintiff to enter an appearance for the Defendant will not, after a delay of two months, be granted *ex parte*.

The practice in such a case is not to make an order *nisi*, but to require notice of the application to be given, or that there should be fresh service of the *subpæna*

MR. SHEBBEARE, on the part of the Plaintiff, moved *ex parte*, under the 8th Order of August 1841 (a), for liberty to enter an appearance for the Defendant.

There had been two months' delay in making the application, and this having been objected by the Court, he asked that the order might be in the form of that made by Sir James K. Bruce in *Bointon v. Parkinson* (b), viz. "that the Plaintiff should be at liberty to enter an appearance for the Defendant at the expiration of

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(a) *Ord. Can. 165.*

(b) 19th April 1843.

ten days, unless the Defendant entered an appearance within that time, and the Plaintiff should undertake to serve the Defendant with notice of this order within eight days."

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~~~~~  
EDMONDS  
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*The MASTER of the ROLLS.*

I cannot make an order to enter an appearance *ex parte* when the Plaintiff has so long delayed to make his application for it. The practice in such a case has been, not to make an order *nisi*, but to require that notice should be given to the other side or that there should be fresh service of *subpæna*. Having always adopted that course, I think it must be followed in the present instance. (a)

(a) See *Radford v. Roberts*, 2 *Hare*, 96.

ATTORNEY-GENERAL *v.* RAY.

May 11.

MR. MAULE applied that the original depositions taken in this cause might be produced at the trial of a civil action at law, but

*The MASTER of the ROLLS*, after inquiry, refused the application, on the ground that the production and proof of the office copies were sufficient.

In a civil proceeding at law, the office copies of the depositions in Chancery being good evidence, the originals will not be ordered to be produced.

See *Highfield v. Peake, Mondy & Mal.* 109. *Hennell v. Lyon*, 1 *B. & Ald.* 182. and *Attorney-General v. Ray*, 2 *Hare*, 518. and 3 *Hare*, 335.

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May 51.

## ASHBY v. JACKSON.

The common injunction to stay trial will not be extended, if it appears from the pleadings, contrary to the usual affidavit, that the discovery will not assist the Defendant at law in his defence to the action.

ON the 19th of April 1843 an action at law was ~~was~~ commenced by the Defendant against the Plaintiff, ~~Pl~~, who, on the 10th of May, filed this bill, praying an injunction. The common injunction was obtained on the ~~the~~ 26th of May, and on the 25th of May notice of trial for ~~or~~ the second sitting in term (9th of June) was given.

Mr. Pemberton Leigh now moved to extend the common injunction to stay trial on the usual affidavit.

Mr. Greene, *contra*, objected, that after the ~~del~~ delay which had taken place, the Plaintiff was not entitled ~~to~~ to extend the injunction on the eve of trial, and that from the facts it appeared that the discovery would be of no avail to the Plaintiff in the action at law. *Thorpe v. Hughes.* (a)

## The MASTER of the ROLLS.

I quite agree with the doctrine of the case cited, and if it appeared to me that the nature of this action ~~was~~ such, that the discovery could not be of any use to ~~the~~ Plaintiff in his defence to the action at law, I should certainly refuse this motion, but that does not in ~~any~~ way appear, nor is the delay such as to disentitle ~~the~~ Plaintiff.

Injunction extend ~~ed~~.

(a) 3 *Myl. & Cr.* 742.

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*In re MARTIN.**May 30, 31.*

IS was a petition presented by Miss *West*, to have the name of the Respondent, a solicitor of the struck off the Rolls under the circumstances in the Master of the Rolls' judgment.

*Pemberton Leigh* and *Mr. Shebbeare*, in support petition.

*Turner* and *Mr. Collins*, *contra*, amongst other ents, urged that the application ought not to be d in consequence of the delay which had taken *In the Matter of* — (a). That the matter en brought forward by the petitioner for the purpose of compelling payment of the debt, and that eared that she would willingly have compromised tter if the Respondent had paid the amount.

*Shebbeare*, in reply.

MASTER of the ROLLS postponed giving his judg- observing that he did not think that the reasons d for not entertaining the petition ought to . That there was no such delay as ought to t his interposing, and that it was no reason why urt, in a proper case, should refuse to relieve the because the party prosecuting the complaint had egotiating for a compromise.

Solicitor struck off the rolls for fraudulently abusing the confidence of his client.

It is the duty of the Court to pro- tect solicitors in the fair discharge of their difficult and delicate duties, but when a soli- citor is found to have availed himself of his honourable and con- fidential po- sition, for the purpose of taking advan- tage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those pri- vileges, and that certificate of character, which are afforded by his being per- mitted to re- main on the roll of soli- citors.

*The*

(a) 2 Barn. & Ad. 766.

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*In re*  
MARTIN.

*The MASTER of the ROLLS.*

The Respondent was the solicitor of Miss *West* in a cause of *West v. Funge*, in which a decree had been obtained. She seems to have placed great confidence in him. He says that a great intimacy arose between him and Miss *West*, and he states his belief, that if she had possessed 5000*l.*, and he had required it, she would have lent it to him.

In November 1840 he requested her to assist him in obtaining 1000*l.*, which he wanted, as he says, for the purpose, amongst other things, of lending a portion of it to Sir John *Scott Lillie* on security. She had then no money to lend, and attempts having been in vain made, to obtain it from one or two other sources, he suggested that she might compromise the suit, and thereby obtain money, out of which she might advance what he wanted. To this she consented, and it was agreed that the suit should be compromised; under the agreement she became entitled to receive 1700*l.* from *Funge* and *Bland*, two of the Defendants, and also the fund in Court, which consisted of 1276*l.* 12*s.* 3 *per cent.* annuities, and 76*l.* 12*s.* cash. To avoid delay in procuring the money before the agreement to compromise could be carried into effect, Miss *West* was prevailed upon to consent to an arrangement, by which Mr. *Martin* was to receive 1000*l.* from the Metropolitan Bank on her credit and security; and accordingly the Bank advanced, nominally to her, but really to *Martin*, the sum of 1000*l.* for two months, and she executed a deed, dated the 12th of December 1840, whereby she assigned to *Courtenay* and *Abbott*, two of the directors of the Bank, the funds to which she was to become entitled on the compromise of the suit, on trust to receive the same, and thereout pay the 1000*l.* and interest, and pay

pay the surplus to her. At the same time, Miss *West* signed a bill, drawn on *Martin*, and accepted by him, for 1000*l.*, payable to the Bank in two months.

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When the money was obtained, Miss *West* was induced to receive from *Martin* 50*l.*, a part of it, for her own use.

Miss *West* thus subjected herself and her property to the payment of 1000*l.*, of which 950*l.* was placed at the disposal of Mr. *Martin*, her solicitor, and Mr. *Martin* gave her a memorandum thus expressed:—"I have received 950*l.* value from Miss *West* to place out, and I hereby undertake that she shall receive at least 5 per cent. for the same, and incur no risk of loss thereof. December 12th, 1840."

The sum mentioned in this memorandum is the sum which he now alleges was the sum lent to him to employ in his business.

But however great her confidence in him may have been, it is plain that she desired security, and did not choose that he should have her money or money obtained on her security, without his acknowledgment in writing that it was to be placed out, and it is clear that the loan from the Metropolitan Bank was no more than a temporary arrangement, until her own money could be obtained. Mr. *Martin* says, he recollects it was stated, that when the suit was settled, the loan made by the Bank would be discharged.

The Metropolitan Bank, having obtained the assignment, put a stop order upon the fund in Court, and very soon afterwards, viz. by two payments, one of 700*l.* on the 22d of December 1840, and the other of 1000*l.* on

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the 20th of *January* 1841, the 1700*l.*, which Miss ~~West~~ was entitled to receive from *Funge and Bland* on ~~the~~ compromise of the suit, was paid to Mr. *Martin*, ~~who~~ ought to have taken the earliest opportunity of paying off the money borrowed from the Bank. The ~~two~~ months, indeed, for which the money was lent, had ~~not~~ then elapsed; but it is plain that Mr. *Martin* had ~~no~~ intention of applying the money in making the ~~payment~~, for on the same 20th of *January* on which he ~~rec~~eived the 1000*l.* from *Funge and Bland*, he presented a petition in the cause, in the name of Miss *West*, ~~and~~ thereby prayed that the stock in the cause which ~~belonged~~ to her might be sold, and that the debt due ~~to~~ the bankers might be paid out of the proceeds, and it was soon afterwards ordered accordingly, and ~~the~~ bankers were so paid.

Under these circumstances, Mr. *Martin* had obtained from the bankers at Miss *West*'s expense the 950*l.*, ~~for~~ which he had given the memorandum of the 12th of *De*cember 1840, and he had also obtained the 1700*l.* from *Funge and Bland*, for which he had given no memo~~do~~randum.

Miss *West* states, that Mr. *Martin* informed her that he had received the 1750*l.* from *Funge and Bland*, and applied 1000*l.*, part of it, in payment of the bankers, and that the remainder was at his banker's; and she says further, that until the 3d of *March* 1841, she did not know that the stock had been sold. That she was very uneasy about her money appears not only by her own affidavit, but by the letters of Mr. *Martin*, the purpose of which he accounts for by saying, that they were written to gain time: and after carefully reading the affidavit of Mr. *Martin* and Mr. *Crowther*, I see no reason to doubt that the other statements which I have made are

are substantially true. After the 3d of *March*, when she was informed of the sale of the stock, she received the **money** which remained after payment of the bankers — she used her best endeavours to obtain the money still due to her from Mr. *Martin*; he paid her in the whole 1500*l.*, and she obtained an order requiring him to retransfer so much of the stock which he had caused to be sold as produced the 1010*l.* paid to the bankers. He was afterwards arrested at *Deal* upon a writ of *ne exeat regno* issued by the order of the Lord Chancellor; and seeking to obtain the benefit of the Insolvent Debtors' **Act**, he was ordered to be imprisoned for a period of ten months, which expired in *April* last.

The Respondent has no doubt suffered severely for the conduct he has pursued, and it is now asked that he may be struck off the Rolls, and after very anxious consideration of the case, I feel myself compelled to make the order.

Except in making the repayment of parts of the sums which he received, it appears to me that every part of the conduct of Mr. *Martin* in the matters in question was improper, and I think, on the examination of the matter and of every affidavit, that he fraudulently abused the confidence placed in him by his client, and endeavoured to effectuate and continue the fraud, by misrepresentations, in a manner and under circumstances which make it my imperative duty to declare, so far as depends upon me, that he is not to be permitted to act as a solicitor, and to continue in a situation which may enable him to conduct himself towards other clients in the same manner.

It is undoubtedly the duty of the Court to protect solicitors in the fair and honest discharge of their difficult

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cult and delicate duties; but when a solicitor is found to have availed himself of his honourable and confidential position, for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those privileges and that certificate of character which are afforded by his being permitted to remain on the roll of solicitors.

Let the order be made as prayed.

June 7.

FLINT *v.* HUGHES.

Bequest of residue to *A.* for life, "and whatever she can transfer to go to her daughters," *B.* and *C.* Held, that the gift to *B.* and *C.* was void for uncertainty.

THE testator, by his will dated in 1842, after giving an annuity, proceeded in the following terms:—

"After this, I bequeath every thing I may die possessed of to my dearly-beloved daughter *Frances Elizabeth*, married to the Rev. *Robert Hodgson Fowler* of *Southwell, Notts*, for her own use during her natural life, and whatever she can transfer, to go to her daughters *Frances*, wife of the Rev. *Charles Ramsay Flint*, and to *Mary Fowler*, spinster." He named *Frances Elizabeth Fowler*, *Charles Ramsay Flint*, and *Richard Hughes*, executors.

This bill was filed by Mr. and Mrs. *Flint* and *Mary Fowler* against Mr. and Mrs. *Hodgson Fowler* and Mr. *Hughes*, praying the establishment of the will, and that the trusts might be carried into execution.

To this bill the Defendants Mr. and Mrs. *Fowler* put in a general demurrer.

Mr.

**Mr. Kindersley** and **Mr. Malins**, in support of the **demurrer**, submitted that the gift over was void for **uncertainty**, it being impossible to say what the testator intended by the expression "whatever she can transfer." That the Plaintiffs therefore had no interest in the property and could not maintain this suit.

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~~~~~  
FLINT
v.
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Mr. Pemberton Leigh and **Mr. Bacon**, in support of the bill, argued that there was a valid gift of the whole property to **Mrs. Fowler** for life, with remainder to her two daughters.

Pope v. Pope (a) was referred to.

The MASTER of the ROLLS said that the objects of the testator's bounty sufficiently appeared, but it was impossible to say what was the subject intended by the expressions "whatever she can transfer," or whether it was to pass to the daughters by a transfer from the mother, or by the operation of the will. He thought therefore that the gift to the daughters was void for **uncertainty**, and allowed the demurrer.

(a) 10 Sim. 1.

1848.

June 5.
July 5.

The wife's equity to a settlement does not attach upon filing a bill; if, therefore, the wife dies without making any claim to a settlement out of her legacy, her children, after her death, have no right to one.

JOHN LEMPRIERE, by his will dated the 19th of May 1821, gave to his daughter *Louisa Moore* 2500*l.* A bill for the administration of the estate was afterwards filed, to which *John Bury Moore* and *Louisa Moore*, his wife (the legatee) were made Defendants, and in 1836 a decree was made for taking the accounts and for making certain inquiries.

In 1837 *Louisa Moore* died.

The Master made his report in 1838, by which he found, amongst other things, that the testator's daughter *Louisa* married the Petitioner in the lifetime of her father, and died at the age of forty-one in *March 1837*, leaving five children.

By the order on further directions in 1839 it was declared, that the pecuniary legacies to the daughters were absolute legacies upon their attaining the age of twenty-four years, and were not subject to a direction for a settlement which was contained in the will; but the children claiming a settlement in right of their mother *Louisa*, it was directed that the amount of her legacy, when ascertained, should be carried to the account of "*Louisa Moore and her children*," subject to further order.

Several further proceedings being afterwards had in the cause, the amount due on the legacy to *Louisa Moore* was found to be the sum of 1941*l.* 12*s.* 9*d.*; and which, according to the order of 1839, had been carried to

to the account of *Louisa Moore* and her children. Mr. ~~Moore~~ now presented a petition for payment to him of the legacy, and the question now was, whether Mr. ~~Moore~~ was entitled to it as the representative of his deceased wife, or whether the children, in right of their deceased mother, had any and what right to a settlement.

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Mr. Flather, in support of the petition.

Mr. Whitmarsh, *contra*, for the children.

Murray v. Lord Elibank (a), Lloyd v. Williams (b), Steinmetz v. Haltin (c), Groves v. Clarke (d), were cited.

The MASTER of the ROLLS.

July 3.

I conceive it to be settled, that if there be a decree for a settlement on the wife, the children are entitled to the benefit of it, although the wife may have died before any proposal for a settlement was carried into the Master's office.

In this case, the wife filed no bill claiming a settlement, and she died before any order for a settlement was made. In *Scriven v. Tapley (e)*, the child after the death of her mother filed her bill for a settlement. It was decreed to her by Sir *Thomas Clarke* at the Rolls, but as to that part the decree was reversed by Lord *Northington*.

And in the case of *Lloyd v. Williams*, Sir *Thomas Plumer*, after a careful examination of all the authorities, said,

(a) 10 *Ves.* 84. 92.

(d) 1 *Keen*, 132.

(b) 1 *Mad.* 450.

(e) *Amb.* 509.; 2 *Eden*, 337.

(c) 1 *Gl. & Jam.* 64.

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said (a), that no case had trench'd upon *Sciven v. Tapley*, and the conclusion to which he came was, "that the right of the child can arise only out of contract ~~or~~ under a decree."

This case would therefore be very clear, if it were not for the case of *Steinmetz v. Halkin* (b), which was decided by Sir John Leach when he was Vice-Chancellor; who, after admitting that the equity was personal to the wife, and that the Court acknowledged no original right in the children, and that the children could claim only such provision as the wife thought fit to secure for herself, nevertheless was of opinion, that when a suit was instituted for the administration, out of which the legacy was to be paid, and the wife was a party defendant to such suit, the equity of the wife attached upon the property on the filing of the bill, and that the equity having attached upon the property, and the wife having died without waiving it, the children became entitled to the benefit of it.

If this case had been followed by others, I should have considered myself bound by it; but standing alone, and being, as it appears to me, contrary to the previously existing rules on this subject, I do not consider myself to be at liberty to act upon it, without considering the principle on which it is founded.

In all cases, the equity of the wife is personal, and it arises upon the vesting of the legacy in her: it may be defeated by a voluntary payment of the executors to her husband, who has a legal right to receive it, and give a discharge for it. If the payment is to be made through the medium of the Court, her equity will be enforced,

(a) 1 *Mad.* 464.

(b) 1 *Glyn & J.* 64.

enforced, if she desires it, but not otherwise; she may abandon it, in which case her children can claim nothing, and if she claims it for herself, the Court requires the benefit to be extended to her children: her equity and the equity of the children are treated as one equity, to be enforced or not at her option. If the equity were to be considered as attached to the property on the filing of the bill, it must, I apprehend, be considered for the benefit of her children at the same time, but if so, she could not afterwards waive it for herself, because her equity and theirs are one; and as it is admitted that she can waive it after the institution of the suit, it seems to me to follow, that it is not an equity, which, upon the filing of the bill, attaches upon property for the benefit of the children.

It is true, that after the filing of the bill, the discretion which the trustee or executor had to pay the wife's legacy to the husband is greatly altered. The filing of the bill has, it has been said, made the Court the trustee, and if the wife be living, the Court will not pay the wife's legacy to the husband if she desires a settlement, or unless she waives it; but when death has made any option on her part impossible, when nothing has occurred from which it can be concluded that she has made an option, there seems to be no reason why the legal right of the husband should not prevail, and I am therefore of opinion, notwithstanding the case of *Steinmetz v. Halthin*, that in this case the wife's equity did not attach to the property for the benefit of the children on the institution of the suit, or before her death, but that upon her death before decree, and before any arrangement for a settlement, her legal personal representative became entitled to the legacy.

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June 5.
July 3.

TOGHILL v. GRANT.

In re BOORD.

Where taxation is directed after action brought, this Court does not give the client the costs of taxation, though more than one-sixth be taxed off.

ON the 18th of *September* 1839 Mr. *Morris*, who ~~had~~ been the agent of Mr. *Boord*, a solicitor, delivered three bills of costs.

On the 12th of *November* 1839 Mr. *Morris* commenced an action against Mr. *Boord* to recover the amount ~~of~~ those bills.

And on the 13th of *January* 1840, two months after the commencement of the action, and nearly four months after the delivery of the bills, the Petitioner obtained ~~an~~ order for the taxation of the bills. (a)

On taxation, more than one-sixth of the amount ~~of~~ the three bills was taken off, and Mr. *Boord* now presented a petition to compel Mr. *Morris* to pay the costs of the orders of reference and of the taxation.

The matter had been referred by the parties to Mr. *Mills*, of the six-clerks' office, who directed the costs ~~to~~ be paid by Mr. *Morris*, but it was alleged that his attention had not been called to the authorities on ~~the~~ subject.

Mr. *Beavan*, in support of the petition.

The Court, by analogy to the rule which the statute lays down, throws upon the solicitor the costs of the taxation,

(a) 2 *Beavan*, 261.

~~Taxation~~, where his bill is reduced by more than one-sixth of the amount; *Barton v. Pyne*. (a)

Mr. Corrie, *contra*.

At law, an agent's bill cannot be taxed at all. When the order for taxation is obtained after action brought, the client is not entitled to the costs of the taxation, even if more than one-sixth be taken off his bill. This is the rule of courts of law, *Jay v. Coaks* (b), and of this Court; *Smith's Practice*. (c)

Mr. Beavan in reply.

The rule stated has been adopted by the courts of law only, and has never been followed in this Court. Mr. Beames (d) refers to the rule as applicable only to courts of law: he says the rule *may* be usefully and justly followed in equity, this assumes that it has never yet been adopted there. The foundation for what is stated in Mr. Smith's book is merely the common law decision. It seems to have been the opinion of Mr. Mills, an experienced sworn clerk, that the Respondent is liable to pay the costs.

Hatherway v. Hatherway (e) was also referred to.

The Master of the Rolls.

July 5.

It was objected that the reference was not obtained till after the action had been brought by the Respondent, and that according to the practice of the courts of law, the costs of taxation are not given, although more than one-sixth may be taken off the bill; and it being alleged that

(a) 1 <i>Hare</i> , 496.	(d) <i>Beames's Costs</i> , (2d ed.)
(b) 8 <i>Barn. & Cr.</i> 635.	201.
(c) Vol. I. p. 706. (2d ed.)	(e) 2 <i>Mad.</i> 329.

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that the practice in this Court was different, I thought it right to cause inquiry to be made, and it has been certified to me, that where an action to recover a bill of costs is brought before the order to tax the bill is obtained, it is not the practice in this Court to give the client the costs of taxation, although more than one-sixth may have been taken off the bill.

And this being so I must decline to make any order upon this petition.

NOTE.—The law has since undergone an alteration by the passing of the 6 & 7 Vict. c. 73., under the thirty-seventh section of which it has been held, that under the circumstances stated in the text, the Attorney is liable to the costs. *Ex parte Woollett, Ex* chequer, 23d Jan. 1844.

June 25.

JORDAN v. LOWE.

Devise of leaseholds on trust for A. for life, and afterwards to his issue male severally and respectively according to their seniorities, and in default to his heirs, according to their seniorities, and in default over. Held, that A. took an absolute interest.

THE testator, being possessed of a leasehold estate renewable every seven years, devised it to trustees upon trusts which he declared as follows:—“I direct my said trustees to remain and continue seised and possessed thereof, and to pay the rents and profits thereof to or to the use of, or to permit and suffer my cousin *Robert Jordan*, son of my uncle *Jonathan*, to hold and enjoy, or to receive and take the rents, issues, and profits thereof, to his own use and benefit, during the term of his natural life; and from and immediately after the decease of the said *Robert Jordan*, then I direct my said trustees to pay the rents and profits thereof to his issue male lawfully begotten, severally and respectively according to their respective seniorities; and for default of such issue male as aforesaid, I devise the same to the use

f the eldest and all other the daughters and daughter
y said uncle *Jonathan*, according to their respective
rities; and in default of such issue of my said uncle
chan, then I devise the same to the eldest daughter
y said cousin *Robert* for all my estate and interest
in. And I direct the said leasehold estate shall be,
time to time, renewed by and in the names and
of my said trustees."

The question was what interest *Robert Jordan* took in
household.

-. *Malins*, for *Robert Jordan*, the Plaintiff, contend he took the leasehold absolutely.

Mr. Bird, for *Thomas Jordan*, the eldest son of the
stiff, and

r. *Borton*, for the younger children, contended that plaintiff took a life interest only.

r. *Heathfield*, for the trustees of the will.

r. *Malins*, in reply.

ie following authorities were relied on:—*Jones v. organ* (a), *Knight v. Ellis* (b), *Lyon v. Mitchell* (c), *r v. Curwen*. (d)

The MASTER of the ROLLS was of opinion that the Plaintiff took a *quasi* estate tail, and said he must make a decree in favour of the Plaintiff, according to the prayer of the bill.

1 B. C. C. 206. Com- *Attorney-General v. Bright*, 2
d on in *Fearne's Cont.* *Keen*, 57., 2 *Jarman on Wills*, 496.

134. (c) 1 Mad. 467.

2 B. C. C. 570.; and see (d) 5 Sim. 264.

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1845.

June 8. 22.

HUGHES v. GARNONS.

A correspondence took place between a client and his solicitor during the progress of a suit. A compromise was effected, but afterwards a second suit was instituted to set it aside, and to prosecute the original suit. Held, that the correspondence was privileged in the second suit.

THE object of this bill was to set aside a compromise which had been entered into in a suit of *Garnons v. Hughes*, and to enable the Plaintiff to proceed on a decree which had been made in the original suit.

One of the Defendants, by his answer, admitted that he had in his possession divers letters, and copies of letters which passed between *Henry Rumsey Williams* deceased (a solicitor), and Mr. *Smedley*, his agent, and others, during the progress of the said suits, and with reference thereto, but he said, "that all the said letters and copies of letters were confidential communications between *Henry Rumsey Williams* deceased and *Richard Garnons*, the solicitor and client respectively in the said suit, and with reference thereto."

Mr. *Pemberton Leigh* and Mr. *Renshaw*, for the Plaintiffs, moved for the production of these, amongst other documents admitted to be in the Defendant's possession. They referred to *Addis v. Campbell*. (a)

Mr. *Cockerill*, contra. The correspondence took place between the solicitor and his client in the other suit, which it is the object of the present suit to prosecute, notwithstanding the compromise. The documents are therefore privileged, and ought not to be produced; *Bolton v. The Corporation of Liverpool*. (b)

The

(a) Not reported on this point. (b) 1 *Myl. & K.* 88.

The Master of the Rolls.

I think the Plaintiff must be content with the production of the other documents. These cannot be ordered to be produced.

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v.
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ADNAM *v.* COLE.

June 26.

THE testator being seised of a freehold cottage at *Long Parish*, and being possessed of a leasehold at *Vale Place*, devised and bequeathed the residue of his real and personal estate to his executors, upon trusts which were expressed as follows:—"Upon trust to pay and apply the rents, use, enjoyments, and profits thereof to my wife *Frances Adnam*, for and *during the term of her natural life, subject nevertheless to the payment thereout to Charles Adnam of 10l. a year during his life, and after his decease, 10l. a year to Elizabeth, his wife, if she survive him, during her life;*" and from and after the decease of my said wife, upon trust to sell my messuage, &c. at *Vale Place* aforesaid, "as soon as conveniently may be after the decease of my said wife, and the monies arising therefrom to sink into and become part of the residue of my personal estate; and from and after the decease of my said wife, I give my cottage and garden at *Long Parish* aforesaid, with the appurtenances thereunto belonging, unto the said *John Thompson*, his heirs, &c., subject and charged with the yearly payment thereout of 3l. to be applied as hereinafter mentioned; and upon further trust, after the decease of

Gift of residue to pay income to widow for life, subject to the payment thereout of an annuity of 10l. to *A.* for his life. After the decease of his widow, a disposition was made of the property, and amongst other gifts there was one of the dividends of 1000l. stock to *A.* for life. Held, that the annuity to *A.* ceased upon the death of the widow, and that *A.* then took the dividends on the 1000l. in substitution.

Bequest of chattels real to trustees to erect such monument as

my was valid, the

they should think fit, and build an organ gallery. The first object second invalid under the Statute of Mortmain. Held, that the trustees were wrong in applying the whole to the first object, and an inquiry was directed to apportion the gift.

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my said wife, to pay and apply the interest and dividends of 1000*l.* stock in the 3 per cent. reduced Bank annuities unto the said *Charles Adnam* during his natural life, and from and after his decease, to pay the like interest and dividends to his wife, the said *Elizabeth Adnam*, if she shall survive him; and from and after the decease of the survivor of them, upon trust to pay and divide the said principal sum of 1000*l.* stock, unto and amongst all and every of the children of the said *Charles Adnam* and *Elizabeth* his wife equally." He then bequeathed certain legacies after the decease of his wife, and proceeded as follows:—"And as to all the residue of the said trust monies, it is my will and desire, and I do hereby direct my said trustees, &c., to lay out the same for the purpose of erecting such a monument to my memory, as my trustees shall think fit, and for building a neat, substantial Gothic organ gallery, over the north door, within the parish church of *Long Parish* aforesaid, and for purchasing and putting up an organ within the said gallery, which gallery and organ are to be erected and placed, with the consent of the Vicar and Churchwardens, under the directions of my said trustees or trustee for the time being."

There were two questions, the first, whether the annuity of 10*l.* a year to *Charles Adnam* ceased upon the death of the testator's wife; and the second question related to the monument and organ gallery, with regard to which the bill alleged that the gift was void, and with respect to which the following circumstances took place.

The Defendants, the executors, said, "they were advised by counsel, that the executors of the testator were authorised, by the will, to apply and expend such part of the testator's residuary personal estate as they, in their discretion, might deem fit, or even the whole thereof,

thereof, if they should think fit, in the erection of a **monument** to the testator's memory.

“ That they, acting upon such advice, had applied a **sum** exceeding, as they believe, the whole amount of **such** residue, in erecting such monument, and in and **about** the expenses connected therewith.”

“ That the monument they had so erected to the **memory** of the testator, and which was called *Adnam's Chapel*, had cost in the actual erection thereof the sum **of 294*l.* 19*s.* 3*d.*** or thereabouts.”

“ That they had not applied any part of such **residue**, and that there, in fact, remained no part applicable to the building or erection of an organ gallery, or **of putting up an organ** therein.”

Mr. *Pemberton Leigh* insisted, first, that the *10*l.** a year was payable to *Charles Adnam* and wife for life, even after the death of the widow.

Secondly, that the trustees had not exercised a due discretion in laying out the whole residue in the monument, and he insisted that there ought to be an inquiry to ascertain what proportion ought to have been laid out on the organ and organ gallery, which amount, so far as it was connected with realty, would belong to the representatives of the testator, in consequence of the gift of realty for such a purpose contravening the Statute of Mortmain.

Mr. *Lloyd* contra. The annuity ceased on the death of the widow, because it was given out of a subject which was only to endure during that period. This construction is corroborated by the subsequent parts of the

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will, which disposes, in another way, of the whole subject out of which the annuity of 10*l.* was to be paid, and gives to the annuitants the dividends on 1000*l.* as a substitute.

The gift of realty for the purpose of erecting a monument is not within the Statute of Mortmain (a); *Mellick v. The President &c. of the Asylum.* (b) The trustees were empowered to erect such a monument "as they should think fit." They therefore had a discretion, and were justified in laying out any part of the residue they thought fit in erecting a monument. In *Cooke v. Farrand* (c), the widow had the power to will any part or proportion of the residue, and it was held that she might dispose of the whole. In *Talbot v. Tipper* (d), a party had the power of leasing at such rent "as he should think fit;" it was held that he might make a lease without reserving any rent.

Mr. Pemberton Leigh in reply. If this were a residuary gift to be divided between three persons as the executors thought fit, a distribution excluding one could not stand. We have a right to have a due and proper part apportioned to the second of two purposes, namely, the building the organ gallery, &c., and if there be any difficulty, the Master must settle the proportions.

As to the annuity, the gift to *Charles Adnam* is distinctly for his life. The payment is not to be made out of the life estate of the widow, but out of the estate of the trustees. I admit, that if the gift had been to *A.* for life, she paying thereout an annuity to *B.* for his life, it must have ceased on the death of *A.*; but here the duration

(a) 9 George 2. c. 56.

(b) *Jacob*, 180.(c) 7 *Taunt.* 122.(d) *Skinner*, 427.

duration of the estate of the trustees is quite sufficient to pay the annuity during the life of the annuitant.

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The Master of the Rolls.

This will is very inaccurately expressed. The testator directs the whole income to be paid to his wife for life, subject to the payment of an annuity of 10*l.* to *Adnam* during his life, and after his decease 10*l.* a year to his wife for life; after the death of the widow, there was to be a sale of part of the property, and there is a disposition of the residue, and amongst other gifts, there was one of the dividends of 1000*l.* stock to *Adnam* for life, and afterwards to his wife. I think, taking the whole together, that the dividends on the stock were given by way of substitution for the annuity of 10*l.* a year, and that the annuity has ceased.

As to the other point, there can be no reasonable doubt: the testator had two objects in view, viz. the monument and the organ gallery; both were to be considered with reference to the amount of the residue. He intrusted, to a certain extent, a discretion with the trustees: they were to erect such a monument as they thought fit, but they were not to expend on one object whatever they thought fit, without regard to the other object. The testator could not have meant that.

The rules of law do not permit chattels real to be applied to one of those purposes, I must so declare, and refer it to the Master to ascertain in what proportion the residue ought to be divided between these two objects.

1843.

July 1.

TARBUCK v. GREENALL.

Certain persons were properly made parties to a suit, previous to the orders of *August 1841*, which made them no longer necessary parties. Held, that they might properly be dismissed at the subsequent hearing.

THIS bill was filed previously to the general order of *August 1841*, coming into operation. By the 30th of these orders (a) it is directed, "that in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds or the rents and profits, in the same manner and to the same extent, as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases, it shall not be necessary to make the persons beneficially interested in such real estate or rents and profits parties to the suit; but the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

The case came within this order, but the bill having been filed before it came into operation, the parties beneficially interested had been made parties to the suit, and were numerous.

The cause now came on for hearing, when the usual accounts were directed, but in addition.

Mr. *Pemberton* and Mr. *Chapman*, for the Plaintiff, proposed, that as, under the general order referred to, the

(a) *Ord. Can. 175.*

the trustees sufficiently represented the estate, the parties beneficially interested should be dismissed from the suit and their costs provided for.

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GREENALL.

Mr. Turner submitted, whether the order applied to such a case as the present, and whether it could have been intended by the Court to alter the rights of parties and the frame of a record, in a suit instituted previous to the orders coming into operation. He suggested that a difficulty might occur on the part of the purchaser of the estate under the decree.

Mr. Kindersley, Mr. Dixon, Mr. Bigg, Mr. Faber, Mr. Piggott, and Mr. Jervis, for other parties.

The Master of the Rolls said, that the orders applied to all existing cases (a), and, therefore, that parties whose presence had become unnecessary might be dismissed at any time, upon making a proper provision for their costs.

(a) 51st Order. See *Ord. Can.* 178.

1843.

July 22.

BENNETT v. MERRIMAN.

Bequest to widow for life, and afterwards to transfer to testator's children *then* living, with a gift to the issue of such children if dead, the issue to take only the share their father would have been entitled to. Held, that the issue took by substitution, and that to entitle them they must survive the tenant for life.

A compromise under the Court, held not to exclude a point of construction not then under consideration.

THE testator gave his real and personal estate trustees, on trust to convert and invest, and ~~put~~ the interest to his wife for life. He then proceeded the following words, "and from and after the decea ~~of~~ of my said dear wife, then upon trust, to pay, assig ~~to~~ transfer, and assure unto each and every of my sa ~~daughters~~ daughters who shall at that time remain unmarrie ~~the~~ the full sum of 1000*L* sterling, to and for her and the ~~own~~ own sole and separate use and benefit, and the resid ~~of~~ of the said principal monies, dividends, and intere ~~and~~, unto and amongst all and every my said children (~~in~~ ~~including~~ including my said son *William*), *who shall then be living*, or if dead leaving (a) lawful issue, in equal shares ~~and~~ proportions if more than one, and if but one, then ~~to~~ such only child; the share of my said son to be paid *or* assigned and transferred to him, when he shall attain his said age of twenty-one years, and the share or shares of my said daughters, as and when she or they shall respectively attain that age or be married; the issue of any of my said children to take only the share their father or mother would have been entitled to, and if such issue should consist of more than one child, to take the share of their father or mother in equal proportions, and if but one, then such one child to take the whole of their father's or mother's share.

" Provided always, that if any of my said children or child shall die without leaving issue, before he, she, or the:

(a) On production of the original will it was doubtful whether this word was "having" or "leaving."

they shall respectively have attained his, her, or their age or ages of twenty-one years, or without having been married, then the share or shares of him, her, or them so dying shall, from time to time, go, accrue, and belong to the survivors or survivor of them, and be paid or assigned and transferred to him, her, or them, if more than one, equally, at such times and in the same manner as is hereinbefore declared touching their original share or shares."

The testator died in 1811. *Kezia*, one of his daughters, married in 1820, and died in 1822, leaving one child, *Kezia May Bennett*, who died an infant in 1841, without having been married.

The testator's widow died in 1842.

The first question which arose on this petition, was whether the legal personal representative of *Kezia May Bennett* was entitled to a share in the testator's residuary estate.

Another question arose under the following circumstances:—Suits having, in 1818, been instituted for the administration of the testator's estate, praying accounts, &c., and that the rights and interests of all parties in the estate and effects of the estates might be ascertained by the Court, the usual decree for accounts was in 1820 made, but it was not prosecuted, for in 1826 it was referred to the Master to consider and state to the Court, whether, under the circumstances of the case, it would be for the benefit of the parties beneficially interested in the estate of the testator, that the said suits should be compromised, upon the terms and conditions therein mentioned.

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The Master, by his report, dated the 24th of ~~Mar~~ 1827, after setting forth the state of the assets, and certain irregular dealings therewith, certified, that he was of opinion, that it would be for the benefit of the parties that the before-mentioned suits should be compromised upon the terms following, that is to say:— the petitioners (the children of one of the testator's daughter), “being considered to be entitled to one third part of the estate of the said testator *William May*, in the stead of their late mother *Ann Elizabeth Merriman* deceased; the said *Kezia May Bennett*, as being considered to be entitled to one third part thereof, in the stead of her late mother the said *Kezia Bennett* deceased; and the petitioner *Caroline Davis* and the trustees of the settlement on her marriage with *William Davis*, as being considered to be entitled to one third part thereof, that the suits should not be further prosecuted as to the accounts and inquiries directed by the decrees.” That certain sums of stock and cash in the report mentioned should be considered as forming the residue of the testator's estate; that the same, subject to certain costs, should be considered as belonging to, and be divided between and amongst the several parties thereinbefore mentioned in equal third parts, and should, upon the death of the testator's widow, be carried over to the several separate accounts; and that the interest and dividends should be paid to her for life.

The report was confirmed, and the funds were carried over with directions to pay the dividends to the widow for life, “and upon her death, any person or persons entitled to or interested in the residue of the said testator's estate, were to be at liberty to apply to the Court concerning the same as they should be advised.”

A petition

A petition was presented upon the death of Mrs. *Bennett*, for payment out of Court of the fund.

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Mr. *Pemberton Leigh* and Mr. *Shebbeare*, in support of the petition.

There are two questions, first, as to the construction of the will; and, secondly, as to the effect of the compromise. On the first point, we contend that the representative of *Kezia May Bennett* is not entitled to any portion of the fund, she not having survived the widow of the testator; first, because those only could take to whom transfer and payment was directed to be made; and, secondly, because the gift to the issue of the children was by way of substitution, and, therefore, the issue could only take in the same event in which their parents could take.

The children were to be ascertained at the time the gift was to take effect. There is this peculiarity also in the language of this will, which distinguishes it from the other cases. The gift is in the form of a direction to transfer to persons (a) who are to be then in existence, and these words alone constitute the gift.

The compromise does not affect this case, as the point was never referred to or brought before the consideration of the Master.

Mr. *Kindersley* and Mr. *H. Williams*, for the representative of *Kezia May Bennett*.

The compromise entered into between the parties, approved of by the Master, and confirmed by the Court, has determined all questions between them.

The

(a) See *Jones v. Mackiwain*, 1 *Russ.* 225.

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The order made thereon binds even the infants. The original and supplemental bill prayed that the right and interests of all parties might be ascertained; if the suits had proceeded, their rights would have been determined, but they were disposed of by the compromise.

Secondly, by the terms of the will, the representative of *K. M. Bennett* is entitled to share in the fund.

The gift is to the children of the children, unaffected by any such condition as that of surviving the widow, the Court has no authority to introduce such a contingency. If there had been a direct gift, it could not be contended that it was not vested, and there being a mere direction to transfer makes no difference; it is mere modification of the same sort of gift. The issue would mean the issue living at the death of the parent and not of the tenant for life; and if the construction on the other side be adopted, the words "if dead, leaving lawful issue," must be rejected. The testator's daughter *Kezia* died, leaving issue, and the only condition was performed. The language which requires the legatee to be alive at the death of the tenant for life, applies only to the children of the testator.

Mr. P. Leigh, in reply. It was never referred to the Master to approve of a contingent gift being converted into an absolute interest.

Gray v. Garman (a), *Pinbury v. Elkin* (b), *Barnes* (c), *Allen* (c), *Stanley v. Wise* (d), *Tytherleigh v. Harbin* (e), *Christophers* (f).

(a) 2 *Hare*, 269.

(d) 1 *Cox*, 432.

(b) 1 *P. Wms.* 563.

(e) 6 *Sim.* 329.

(c) 1 *Bro. C. C.* 181.; and 3

Ves. 208. n.

Christopherson v. Naylor (a), *Butter v. Ommaney* (b),
Waugh v. Waugh (c), *Peel v. Catlow* (d) were cited.

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In the first place, it does not appear to me, that the orders which were made for the purpose of compromising the former suit, do determine this question in any way whatever. The Court sanctioned a compromise, and *Kezia May Bennett* was to be considered entitled to one third part of the estate in the stead of her late mother deceased. Was she to be entitled to it absolutely, by arrangement between the parties, and independently of the will, or as a legatee under and according to the terms of the will?

If this question had been raised at the time, and upon consideration of the matter, and on looking at the Master's report, the Court had determined that she was absolutely entitled, the fund would, without doubt, have been placed to her account absolutely. If, on the other hand, the Court had determined that it was contingent upon her living at the death of the tenant for life, then it would have been carried to her contingent account. I therefore consider this question to be open.

I do not delay putting a construction on this will, for I think I could not acquire greater certainty by further consideration. There is, I think, great inaccuracy and uncertainty in the expressions. The testator, speaking of the residue which he had given to the trustees, says this, "upon trust to pay, assign, transfer," &c. "the residue unto and amongst all and every my said children who shall be then living." That

is

(a) 1 <i>Mer.</i> 320.	(c) 2 <i>Myl. & K.</i> 41.
(b) 4 <i>Russ.</i> 70.	(d) 9 <i>Sim.</i> 372.

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is simple enough; but then he proceeds "or if dead, 'leaving,' or 'having' lawful issue, in equal shares and proportions, if more than one, and if but one, then to such only child."

This clause, by itself, is ambiguous; but the next clause shews clearly that he meant the issue to take, for he says "the issue of any of my said children to take only the share their father or mother would have been entitled to." So it is clear he intended the issue to take under the former clause; he assumes that as appears from that which follows immediately afterwards.

Then what issue were to take? Clearly the issue to any child of his own who might be dead at the time of the death of the tenant for life. And then comes the question, whether the issue of any daughter living at the time of her death, but who afterwards died in the lifetime of the tenant for life, could take. That is the question raised on the present occasion.

Now with regard to the general rule as to gifts in remainder, there is no doubt. The question is, whether the peculiar wording of this will does not lead to a different construction. I conceive that the expression in the first part, construed by the last, implies a gift to the children who should be living at the time of the death of the tenant for life, and to the issue of any child who may have previously died, such issue being living at the death of the tenant for life. I think so, because the words which follow shew that he clearly intended the issue to take by substitution, for "the issue of any of his said children are to take only the share their father or mother would have been entitled to."

The

The gift also is to be by a transfer or payment, and not in any other way ; the transfer or payment is "to be made to those children of the testator who might be then living," namely, at the time of the death of the widow. The issue of any daughter who might have previously died, is to take, by way of substitution, "the share the mother would have been entitled to."

The words "transfer and pay" constitute the gift both to the children living at the time of the testator's death, and to the issue. And I do not think it unworthy of consideration here, that if you construe it in any other way, you apply the same words in one case to the class of children living at the death of the tenant for life, and in the other case, to the issue not only who were then living, but who had previously died.

The case is attended with considerable doubt and difficulty; but, on the whole, it appears to me, upon upon the construction of the words of this will, that the gift was intended to be for the benefit of those persons only who were living at the death of the tenant for life, and the whole issue of one of the children of the testator having died in the lifetime of the tenant for life, I think that the other children are entitled.

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HEARN v. WAY.

The Plaintiff upon filing a demurrer wrote to say he submitted thereto, and would obtain an order to amend. More than two months afterwards, he obtained an order, as of course, to amend, it was discharged for irregularity.

Practice as to filing, entering, setting down, and submitting to a demurrer.

ON the 7th of *March* 1843, the Defendant filed a demurrer to the Plaintiff's bill, and gave notice thereof to the Plaintiff's solicitors on the same day.

On the 11th of *March*, the Plaintiff's solicitors wrote to the Defendant's solicitor, stating that they were instructed to submit to the demurrer, and that an order to amend would be obtained forthwith.

The demurrer was neither entered by the Defendant nor set down by the Plaintiff. The Plaintiff took proceedings to obtain administration to the parties, whose absence was the cause of the demurrer, which he effected on the 4th of *May*, and on the 12th of *May*, he obtained an order of course to amend the bill, on payment of 20s. costs. The order was in the common form, and contained no statement of the special facts which had occurred in the suit.

It was now moved to discharge this order for irregularity, with costs.

Mr. *Pemberton Leigh* for the motion.

Mr. *Willcock contra*.

Bullock v. Edington (a), Nicholson v. Peile (b), Charlton v. Richmond (c), Jordan v. Sawkins. (d)

*a) 1 Sim. 481.
b) 2 Beavan, 497.*

*(c) 4 Beavan, 397.
(d) 3 B. C. C. 372.*

The Master of the Rolls.

The Defendant having filed a demurrer, is to give notice to the Plaintiff of his having done so. (a)

And within eight days after the filing, he is to enter the demurrer with the Registrar. Neglecting to do so, the demurrer will be overruled, or deemed to be abandoned. (b)

After the demurrer has been entered, either party may set it down for argument.

Upon the demurrer being filed, the 34th Order of August 1841 (c) declares, that it shall be held sufficient, unless the Plaintiff shall, within twelve days from the expiration of the time allowed to the Defendant for filing such demurrer, cause the same to be set down for argument.

Before the demurrer is set down, the Plaintiff may obtain an order, as of course, to amend the bill, on payment of 20s. costs. (d)

If the demurrer has been set down, the Plaintiff submitting thereto, is not to amend without the payment of additional cost. (e)

On the 12th of March before the notice was given, it was the duty of the Defendant to enter and set down the demurrer, and the Plaintiff was at liberty to amend on payment of 20s. costs.

The

(a) *Ord. Can. 216.*

wall Railway Company, 2 Beavan,

(b) *Beames' Orders, 287.; and*

255.

see Dalton v. Hayter, post.

(c) *Anon. 9 Ves. 221. 32d*

(c) *Ord. Can. 174.*

Order of April 1828. Ord. Can.

(d) *Warburton v. The Black-*

17.

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The Plaintiff did not then amend, and he put a stop to any further step on the part of the Defendant, by giving notice that he submitted to the demurrer, and intended to amend.

I am of opinion, that the Plaintiff's notice relieved the Defendant from the duty of entering the demurrer, and that after it, the Plaintiff would have had reason to complain, if the Defendant, instead of trusting to the notice, had proceeded to enter and set down the demurrer.

The Defendant had reason to complain that the Plaintiff did not amend his bill, till more than two months after his notice.

And I am of opinion, that if the Plaintiff had stated on his petition for leave to amend, the time which had elapsed since the demurrer was filed, or that he had given notice two months before, that he submitted to the demurrer and intended to amend, the order ought not to have been granted, as of course.

1843.

May 5. 8.

STOCKEN v. DAWSON.

THIS case came before the Court upon exceptions, and for further directions.

The facts, so far as relates to the point intended to be reported, are sufficiently stated in the judgment of the Court.

Mr. *Pemberton Leigh*, Mr. *Turner*, Mr. *Wood*, Mr. *Kindersley*, Mr. *Goodeve*, Mr. *Gordon*, and Mr. *Prendergast*, for the several parties.

Wedderburn v. Wedderburn (a), and *Brown v. De Tastet* (b), were cited.

A surviving partner being the executor of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease, for the benefit of the estate; nor is an executor and legatee of such surviving partner.

The Master of the Rolls.

July 31.

In and before the month of *May* 1820, *John Stocken* and *William Stocken* carried on the business of brewers, in partnership together. *John Stocken*, being entitled to some real estate, and also to some personal estate, besides that which was employed in the brewery, died on the 31st day of *May* 1820, having made a will, dated the 6th of *July* 1818, whereby, after devising as therein mentioned to his son *James Julius Stocken* (the Plaintiff), and his daughter *Maria Mattam* (a Defendant), and reciting, that he was jointly with his brother *William Stocken* possessed of or entitled to certain property, including the brewhouse, garden, cooper-

age,

(a) 2 *Keen*, 722.(b) *Jacob*, 284.

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age, maltlofts, and appurtenances then used and occupied by himself and his said brother, he devised his undivided moiety thereof to *William Stocken, Thomas Carlton and Benjamin Dawson*, in trust to receive the rents, and apply the same towards the support of his son and daughter during their minorities; and when the youngest of them come of age, he devised the same to them in equal shares. He directed, that within a reasonable time after his death, his share in the brewery and the good-will thereof, and the stock and things used therein, should be valued and ascertained, and should be offered for sale to his brother *William*, on fair and reasonable terms. And that he, if he should consent to purchase the same, should be put in possession thereof, on his paying or giving security to the testator's executors for payment of the value, at such reasonable times as they should think proper; and that the monies arising therefrom, and from the joint debts due to the brewery partnership, when got in, should fall into the residue of his personal estate. And he directed, that if his brother *William* should take his moiety of the brewery, stock and appurtenances, he should have the option of purchasing any part of the testator's moiety of the copyhold premises in the will mentioned; but if his said brother should decline to take and purchase his moiety in the brewery &c., he directed that it should continue and be carried on in the same manner in which it then was, for the better maintenance and support of his wife and children. And he gave the residue of his estate equally between his children on their attaining twenty-one years of age; and appointed *William Stocken, Thomas Carlton and Benjamin Dawson*, executors of his will, and trustees for the purposes thereof.

In the month of *October* 1820, the will and a codicil thereto were proved by *William Stocken and Benjamin Dawson*.

*Dawson.* In the preceding months of *June* and *August*, valuation of the brewery and part of the property connected therewith was made, with a view to the purchase hereof by *William Stocken*; and the rest of the property connected with the brewery being afterwards valued in *February 1822*, the whole was stated to amount to the sum of *6429l. 17s.*, from which being deducted the debts of the concern and other sums, the testator's moiety of the remainder was stated to be *2419l. 4s. 9½d.*

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The business was, after the death of *John Stocken*, carried on by *William Stocken*, up to the time of his own death. He appears to have considered himself absolute master of the business and property, under the leave to purchase given by the will and upon the valuations which had been made. He died on the 23d day of *February, 1824*, having first made a will, dated the 1st of *November 1823*, whereby he gave to his son, the Defendant *Oliver Thomas Joseph Stocken*, all his interest in the brewery and in the freehold, copyhold, and leasehold premises in which the same was carried on, and whereby he appointed *Oliver Thomas Joseph Stocken, James King and Benjamin Dawson* executors thereof.

The executors of *William Stocken* having proved his will, they, or *Oliver Thomas Joseph Stocken* with their assent, took possession of the brewery, and he, conceiving himself to be owner under his father's will, carried on the business thereof as he thought for his own benefit.

It was alleged on the part of the Plaintiff during his minority, that either no such valuations as were stated to have been made by *William Stocken* had in fact been made, or that if made, the same were inaccurate and improper; and on the 19th of *January 1827*, the bill was filed by the Plaintiff then an infant, by his next friend, against

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against *Benjamin Dawson*, the surviving executor of *John Stocken*, and one of the executors of *William Stocken*, *Oliver Thomas Joseph Stocken* and *James King*, the two other executors of *William Stocken*, and *Peter Mattam*, and *Maria* his wife, who was one of the residuary legatees of *John Stocken*: and the bill, alleging that *William Stocken* had not become the owner of the brewery and property connected therewith, prayed the usual accounts of the personal and real estates of *John Stocken*, and also an account of the profits of the brewery which accrued from the death of *John Stocken* to the death of *William*, and what was due from *Dawson* and the executors of *William* in respect thereof. The bill also prayed an account of the debts, funeral and testamentary expenses and legacies of *John Stocken*, and that the clear residue of his estate might be ascertained, and the Plaintiff's interest therein secured for his benefit, and that the trade and business and the goodwill thereof might be sold, and one moiety thereof secured for the Plaintiff, and for a receiver.

The cause came on to be heard in the month of November 1830, and by the decree then made, after referring it to the Master to take the usual accounts of the real and personal estates of *John Stocken*, it was declared, that the interest of *John Stocken* in the brewery was not affected by the valuation and purchase in the pleadings mentioned. And it was referred to the Master to take an account of the profits of the brewery, which accrued due since the death of *John Stocken* up to the death of *William Stocken*, and of the profits accruing therefrom from the time of the death of *William Stocken*, come to the hands of *Benjamin Dawson* and *William Stocken* in his lifetime, or either of them, or to the hands of *Benjamin Dawson*, *Oliver Thomas Joseph Stocken* and *James King* since the death of *William Stocken*; and the

the Master, in taking the accounts, was to make unto the parties all just allowances.

The cause was reheard before the Lords Commissioners on the 24th of August 1835, and an error was rectified, but in substance the decree was confirmed.

The Plaintiff's second exception complains of the balance of two sums of 100*l.* 2*s.* 9*d.* and of 15*l.* 15*s.* for payment made in respect of valuations of the partnership property made in the months of April and June 1832; and as it appears to me that these valuations were made with a view to the purchase of the partnership by *William Stocken*, which purchase has been set up, I think that the expense of the valuation should be charged against the estate of *John Stocken*, and consequently that the Plaintiff's second exception should be allowed.

The fourth exception must, I think, also be allowed, as it does not appear that the valuation therein mentioned and charged for was an expence properly incurred in carrying on the brewery business. If it had appeared, it was suggested, that any of the valuations mentioned in the second and fourth exceptions had been made under the directions of *William Stocken* in the proper discharge of his duty as executor of *John*, the expense ought to have been allowed.

The eleventh and twelfth raise, and depend upon, the question whether *William* and *Oliver* were entitled to allowances for their trouble in carrying on the business.

As to the allowance, *John* and *William Stocken* were partners in trade, carrying on business, in which they were equally interested, without articles. *William Stocken* survived,

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survived, and carried on the trade. The will of *John Stocken* enabled him to purchase *John's* share of the business, and he intended to do so, but the decree declares, that the interest of *John* is not affected by the valuation and purchase of *William*, so that we must see what was to be done in the absence of a purchase by *William*, and the will of *John* directs that if *William* declines to purchase, the brewery shall continue and be carried on in the same manner it then was, for the better maintenance and support of the testator's wife and children. This case appears to me to fall directly under the authority of *Burden v. Burden* (a); and I am therefore of opinion, that *William Stocken* was not entitled to the allowance claimed for his trouble; and I think that *Oliver* who succeeded to the management of the business, as the legatee and an executor of *William*, can be in no better situation, and I therefore disallow these exceptions.

(a) 1 *Ves. & B.* 170.

March 24, 25.  
July 8.

## SPALDING v. RUDING.

In equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stop-

page *in transitu*, *ultra* the particular lien of the transferee.

*A.* consigned goods of the value of 1800*l.* to *B.*, who transferred the bill of lading to *C.* to secure 1000*l.* *B.*, having become bankrupt, *C.*, as *B.*'s factor, claimed, as against *A.*'s title to stop *in transitu*, a right to retain the whole in satisfaction of a general balance due to him from *B.* Held, first, that he was not entitled beyond the 1000*l.*; and, secondly, that *A.*'s remedy against *C.* for the surplus, was in equity.

drawn for on *Thomas* at three months' date, payable in *London*, on handing invoice and bill of lading.

The Plaintiffs accordingly, on the 1st of *June* 1841, shipped at *Stralsund*, by the ship *Ceres* 714 quarters of wheat; a bill of lading was signed by *Zillmer* the master of the ship in the usual form, and the Plaintiffs, having made out and signed an invoice of the wheat, sent the same with the bill of lading to *Thomas*, and, at the same time, drew upon him three bills for the amount in the whole of 1264*l.* 2*s.*; and by letter requested *Thomas* to protect those bills.

*Thomas* received the bill of lading and invoice on the 8th of *June* 1841, and he thereupon requested *Ruding* to accept for him a bill of exchange for 1000*l.*, payable at three months after date, which *Ruding* agreed to do, on receiving from *Thomas* a memorandum or letter signed by *Thomas* to this effect: —

“ *London, 9th June 1841.* ”

“ *Messrs. J. C. Ruding and Son.* ”

“ *Gentlemen,* ”

“ In consideration of your having this day accepted my draft on you at three months' date for 1000*l.* on a cargo of wheat (viz. 3825 scheffels), from *Stralsund* per the *Ceres*, *J. H. Zillmer*, of which I have handed you the policy of insurance for 1600*l.* and a bill of lading, I authorise you to dispose of the same on my account, subject to your usual commission and charges, before such bill becomes due; or, I undertake to provide you with cash to the amount of your advance, should I wish you to hold it beyond that time.

“ *James W. Thomas.* ”

On the 1st of *July* 1841, the ship *Ceres*, with the wheat on board, arrived in the port of *London*. About this

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this time, Mr. *Thomas* stopped payment. On the 2d of July, *Schleicher* the agent of the Plaintiffs, gave a verbal notice, and on the 3d of July, a written notice to *Zillert* the master of the *Ceres*, not to part with the wheat, without the orders of the Plaintiffs. On the 5th of July, a fiat of bankruptcy was issued against *Thomas*, and on the same day *Schleicher* again gave notice to the master not to part with the wheat, but being then informed that the bill of lading had been indorsed and delivered to *Ruding* as a security for monies lent, he permitted the wheat to be delivered to *Ruding*, but on the same day gave him notice, that the Plaintiffs claimed to be entitled to the wheat and the proceeds thereof, and did not, by removing the stop placed upon the delivery to *Ruding*, abandon their claim, and that in case *Ruding* should be entitled by law to any part of such proceeds, the Plaintiffs claimed the balance which should remain, after satisfying such claim, if any, as *Ruding* might by law have.

Ruding claimed to be entitled to apply the proceeds of the wheat, not only in payment of the 1000*l.* ~~which~~ ¹¹ which he had accepted, and the freight and other charges of the shipment, but also in satisfaction of the balance of a general account which he alleged to be subsisting between himself and *Thomas*. Under these circumstances, the Plaintiffs offered to pay him 1200*l.* in satisfaction of his acceptance, and the charges on the wheat, and requested to have the wheat thereupon delivered to them. This was on the 23d of July. Mr. *Ruding* refused to accept the money offered to him, or to deliver up the wheat, and he afterwards, on the 21st of August 1841, sold it for 1822*l.*, which he retained to his own use. Having subsequently, in December 1841, declined to acknowledge that the Plaintiffs had any claim whatever, this bill was filed on the 31st of December 1841.

The

The bill prayed, that an account might be taken of the monies which had come to the hands of the Defendant *Ruding*, in respect of the wheat, and also of the monies due to the same Defendant on the security of the bill of lading. That the Defendant might be allowed such last mentioned monies, and might pay to the Plaintiffs the balance of the monies arising from the wheat.

Mr. Pemberton Leigh and **Mr. Wood**, for the Plaintiffs.

Mr. G. Turner and **Mr. Fisher**, for the Defendant *Ruding*.

Mr. Bichner, for the assignees of *Thomas*.

In re Westzinthus (a), Cox v. Prentice (b), Lickbarrow v. Mason (c), Patten v. Thompson (d), Jones v. Jones (e), Ex parte Deeze (g), Young v. The Bank of Bengal (h), Ex parte Ockenden (i), Dixon v. Yates (k), Oppenheim v. Russell (l), Snee v. Prescot (m), Wiseman v. Vandepuett (n), Houghton v. Matthews (o), Goodhart v. Lowe (p), Ex parte Gravynne (q), Hodgson v. Loy (r), Weldon v. Gould (s), Hewason v. Guthrie (t), Phillips v. Huth (u), Drinkwater v. Goodwin (x), Walker v. Birch (y), Worrall v. Johnson (z), were cited.

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|--------------------------------------------------------------|----------------------|
| (a) 5 B. & Ad. 817.                                          | (n) 2 Vern. 203.     |
| (b) 3 M. & Sel. 344.                                         | (o) 3 B. & P. 485.   |
| (c) 4 B. P. C. 57.; 2 Term R. 63.; and 6 East, 20. note (a). | (p) 2 J. & W. 349.   |
| (d) 5 M. & Sel. 350.                                         | (q) 12 Ves. 379.     |
| (e) 8 Mee. & W. 431.                                         | (r) 7 T. R. 440.     |
| (g) 1 Atk. 228.                                              | (s) 3 Esp. 268.      |
| (h) 1 Moore, Pr. C. Cases, 150.                              | (t) 3 Scott, 509.    |
| (i) 1 Atk. 235.                                              | (u) 6 Mee. & W. 572. |
| (k) 5 B. & Ad. 513.                                          | (x) Cowper, 251.     |
| (l) 3 B. & P. 42.                                            | (y) 6 Term Rep. 258. |
| (m) 1 Atk. 245.                                              | (z) 2 Jac. & W. 214. |

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*The MASTER of the ROLLS.*

I apprehend it to be clear, that the indorsement and delivery of the bill of lading by *Thomas* the consignee to *Ruding*, for valuable consideration, gave to *Ruding* the legal right to the delivery and possession of the goods. That right is not disputed by this bill, but the Plaintiffs insist, that under the contract subsisting between *Thomas* and *Ruding*, the right to the possession of the goods was vested in *Ruding*, only as a security for the repayment to him of his advance and charges, and that subject to that security, the Plaintiffs, in the consideration of a court of equity, retained their right to a stoppage *in transitu* against the assignee or indorsee of the bill of lading; it appears that in the case of *Westzinthus* (a) the Court of Queen's Bench held, that in such a case, a court of equity would hold such a transfer to be a pledge or mortgage only, and that the attempt to stop *in transitu* gave a right to the goods, in equity, subject only to the lien for the advance.

The propriety of that opinion was questioned, but, as it appears to me, without sufficient reason. As against *Thomas*, I think that the Plaintiffs had a right to stop the goods *in transitu*; and, although the legal right to the goods was transferred with the bill of lading, yet I think, that in equity, the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the Plaintiffs an equitable interest in the surplus value.

In the argument for the Defendants it was urged, that they, in the character of factors for *Thomas*, had an interest of their own to retain the surplus value in satisfaction

satisfaction of a balance due to them from *Thomas*; and, secondly, that any interest of the Plaintiffs, though of an equitable nature, might be made available in an action to be brought by them against the Defendants in this cause; but the goods came to the hands of *Ruding* under a special contract, interfering with any general right which he might have as factor; and, even if the Defendants were entitled to be considered as factors of *Thomas*, having a balance due to them, it does not appear to me, that, as against the Plaintiffs the owners and shippers of the goods entitled to stop *in transitu*, they could, by virtue of the bill of lading, have a right to retain more than the consideration they paid for the advantage which the bill of lading gave them; and as to the action, the legal right to the goods being clearly in the Defendants, it does not appear to me that the Plaintiffs could have obtained, at law, that relief which I think them entitled to here.

I am therefore of opinion that the Plaintiffs are entitled to the decree which is asked by the bill, and that an account must be taken of the monies received by the Defendants in respect of the wheat in question, and of the monies due to the Defendants on the security of the bill of lading, and that the balance may be ascertained and paid to the Plaintiffs by the Defendants.

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SPALDING
v.
RUDING.

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May 3. The ATTORNEY-GENERAL v. The DRAPERS~~SS~~
Company.

(*Howell's Charity.*)

A bequest was made to a corporation, in terms which devoted the whole improved income to a charity. In 1559, the corporation by their answer in a suit, offered to apply the whole income to the charity. The decree directed the distribution of the whole existing income, and provided that in case of an increase, the objects should receive an increase limited to 16*l.*, but it made no disposition of any surplus. Held, that under this decree the corporation was not, by implication, entitled to such surplus.

THIS was an information filed by the Attorney-General, on the certificate of the Charity Commission, under the following circumstances: —

The testator, *Thomas Howell*, being resident at *Seville*, made his will in 1540, whereby he bequeathed in the words following: — “ Item, I comande myne executors, that I leve in *Syvell* that incontynent after my deathe, doo send to the citie of *London* 12,000 duckats of golde by billes of *Cambio*, for to delyver to the house called the *Drapers' Hall*, to delyver theyme to the wardeynes therof, and the saide wardeynes as sone as they have received the same 12,000 duckats, to bye therewith 400 duckats of rent yerely for ever more, in possession for ever more. And it is my will that the saide 400 duckats be disposed vnto foure maidens, being orphans, next of my kynne and of bludde, to theire marriage, if they can be founde, every one of theyme to have 100 duckats; and if they cannot be founde of my lynnage, then to be geven to other foure maydens, though that they be not of my lynnage, so that they be orphanes honnest and of good fame, and every of theyme 100 duckats, and so every yere, for to marry foure maydens for

Generally, a charitable gift must be accepted according to the declared intention of the giver; but a corporation not being bound to accept an accession to its foundation, may consent to receive it with qualifications, which may be collected either from documents, or constant usage adopted at the time and persevered in downwards.

In charity informations, the account is sometimes carried back to the date of the report of the charity commissioners, sometimes it is directed from the filing the information, and sometimes from the decree, according to the circumstances of each case.

for ever. And if the saide 12,000 duckats will bye more lande, then the saide 12,000 duckats to be spent, the marriage of maydens, being orphanes, increasing ie foure maydens aforesaide, as shall seme by the discretion aforesaide of the master and wardeynes of the saide house of *Drapers' Hall*, and that this *memoria et remayne* in writing, in the booke of memoryes in the saide howse, in suche manner as it shall at no tyme be undon for ever."

The sum of 8720 ducats only was transmitted to the *Drapers' Company*.

In 1543, the *Drapers' Company* purchased from *Henry VIII.* some property in the city of *London*, which had been forfeited by the attainer of *Cromwell, Earl of Essex*, which was conveyed to them; and the company covenanted with the King to distribute the clear rents "to and for the marriage of poor maidens, being orphans."

About 1559, a suit was instituted in this Court (a) by certain female orphans, alleged kinswomen of the testator, stating that the Defendants had purchased lands of the yearly rent of 105*l.*, but had disposed of the residue of the said bequest to their own benefit, and claiming the benefit of the said charity. The *Drapers' Company*, by their answer in that suit, admitted that the rent of the premises purchased with the charity funds amounted to 105*l.* a year, but said that 30*l.* a year was expended in the reparations; and they stated "that they always intended, and still did intend, God willing, as near as they could, to perform the said will and testament of the said *Thomas Hoell*, with as much of the rents of the premises as should come clearly to their hands,

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(a) *Crysly v. Chester.*

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hands, over and above all charges, if they were ascertained, or hereafter should be ascertained, what maidens or orphans of his kin or lineage ought of right to have the same legacies according unto his will, which they unto they could not perfectly attain to know."

By the decree in that suit, it was ordered that 84*l.* a year should be paid "out of the rents and revenues" by the company amongst four orphans, 21*l.* to each; and it was provided that if the premises should be decayed by casualty by fire, so that the 84*l.* could not be levied, the company should be charged with an appropriated part only; and it was further provided, that if the property should be improved, above 84*l.* payable to the orphans and 21*l.* allowed to the company for their ordinary and extraordinary charges, that then the same improvement, over and above the sums of 84*l.* and 21*l.* should be equally divided and paid, yearly, to the said four orphans, portion and portion like, in form thereof before recited; forseeing always, that the same improvement yearly to be divided to the said four orphans ~~did not exceed the value of 16*l.* by the year.~~ And it was provided, that if the company should receive the remaining 3280 ducats, or such portion as would purchase an increase of lands, &c. to the yearly value of 16*l.*, then the company should pay the four orphans so much as the increased rent should amount to, "forseeing that in the whole the said orphans should not be paid above the yearly sum of 100*l.*"

The property now consisted of the hall of the *Drapers' Company*, and other premises producing more than 2000*l.* a year. The company paid 84*l.* a year to the maiden orphans, and carried the residue to the account of the company's income, but they expended a considerable part of their general income in charitable purposes.

The information insisted, that the company were bound to apply the whole income towards the purposes of the charity.

The company, by their answer, relied on the former decree, and submitted, whether they were entitled to appropriate the surplus income to their own use; however, they said, that it had always been considered by the company, that, fulfilling the requisitions of the former decree, which they were willing to do, they were entitled to the property, and were freed from all further demands.

The Solicitor-General, Mr. Pemberton Leigh and Mr. Blunt, in support of the information, contended that, under the terms of the will, no benefit was given to the Defendants. That, both by their covenant with King Henry the Eighth, and their answer in the former suit, they were bound to apply the whole income to the charitable objects. That the decree did not give to them any interest in the surplus, and that if it did, still that the decree was not binding on the Attorney-General, he not having been a party to the suit.

Sir Thomas Wilde, Mr. Kindersley, and Mr. Lloyd contra, insisted, that under the decree the benefits to be taken by the objects of the charity was expressly limited to 100*l.* a year, and that, by implication, the company was to receive the surplus. That every presumption ought, at this distance of time, to be made in favour of the Defendants, who were shewn, by constant usage, to be entitled to the surplus; and that, as the gift was to a class of relatives of the testator, it was not necessary that the Attorney-General should be made a party to the former suit.

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The Attorney-General v. The Coopers' Company (a),
 was cited.

The MASTER of the ROLLS.

It appears perfectly clear, from the terms of the **will**, that the testator intended that the whole of the **rent of** the purchased property should be applied to the **purpose** indicated by him; and subsequently on the occasion **of** the purchase, when the company obtained the **grant** from the Crown, they expressly covenanted, that **the** whole rents should be so applied.

In the answer of the Defendants in the former **suit**, there is a passage which is of the utmost importance **in** this case, not only as shewing their view of the uses **to** which they were bound to apply the gift they had accepted, but also for the purpose of ascertaining the questions raised in that case, and what was then decided by the Court. It is also of some importance, as shewing in what way the gift was accepted, because there have been instances in which the Court has held, that, from contemporaneous transactions, you may infer the nature and extent of the trust assumed by the persons who accepted a gift. No doubt, generally speaking, a gift must be accepted according to the intention of the giver as declared at the time, but where the object is to make a corporation undertake the management of a trust, then, as was stated by Lord *Eldon* in *The Catherine Hall Case (b)*, the college, being under no obligation whatever to accept an accession to its foundation, may only consent to receive an increase subject to certain qualifications, which the Court may collect from the transactions that took place at the time, as evidenced by documents, or a

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(a) 3 *Beavan*, 29. *Attorney-General v. Caius College*, 2 *Keen*, 150.

(b) *Jacob*, 381.; and see *The* *lege*, 2 *Keen*, 150.

proved by a constant usage adopted at the time, and persevered in downwards. This is not a case precisely of that sort, but here we have the Defendant's declaring, by their answer, "that they always intended, and still do intend, God willing, as near as they could, to perform the will and testament of *Thomas Howell*, with as much of the rents of the premises as shall come clearly to their hands."

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It is to be observed, that at this time, the rents, being 105*l.*, were unequal to answer the full purpose of the founder. The decree approves of a scheme by which the whole was disposed of. It gives 21*l.* for the reparation and maintaining the property, and 84*l.* for the portions to be given to the poor maidens; and, it is to be observed, that nothing whatever is reserved to the company. If the company were or had been supposed by the Court to be entitled to a beneficial interest in the rent, surely it would not have been very just to abandon and neglect such interest altogether.

No such declaration was however made, nor could it have been made, because the company had stated in their answer that they were willing to apply towards the charity all that clearly came to their hands. This decree being made with reference to the rents then received and exhausting the whole, it certainly might be expected, that some provision would have been made in the case of any increase or decrease of the rents, especially as the sums to be applied by the company were to be paid out of the rents. Accordingly provision is made for the event of a decrease by destruction by fire. It is true that no direction is contained for a decrease by any other event; but is it to be collected, that in every other event, the decrease was to be made good by the company

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pany out of their own funds? when they were directed to apply these sums "out of the rents."

On the other hand, there might be an increase, either by the improvement of the rents of the estates already purchased, or by new purchases to be made with that part of the money which had not then been transmitted from *Spain*; in both these cases, a provision was made for an increase to the extent of 16*l.*, which, added to the 84*l.*, would make 100*l.*, or four sums of 25*l.* for each maiden. Now, without having arithmetical demonstration of it, I feel strongly persuaded that it was intended to increase the sum to that intended by the testator himself to be the endowment of each poor maiden, and I do not entertain a reasonable doubt that this was what the decree had in view. There is not one word as to any other further surplus that might probably arise; there was an offer by the Defendants to apply every thing, and in that state of things the Court was silent, and did not proceed any further.

The question is, whether I am to collect from the decree that the Court declared, by implication (an express declaration is not found or contended for in any way), that because it had not disposed of the surplus beyond 16*l.*, the rest was to be applied for the benefit of the company. I confess I am totally unable to follow the reasoning by which that is attempted to be made out. If it had been intended, there ought to have been an express declaration, but there could not on those pleadings have been any such a declaration; because it would have been contrary to the offers of the company by their answer. The question never did arise or could arise upon the pleadings in that case, and I am of opinion, that the decree does not, by anticipation, decide the question which is brought before me to-day.

I must,

I must, therefore, look at these documents, and see whether (according to the rules of construction which ~~we~~ been adopted in this Court, where funds are given ~~a~~ charity with a direction to apply them all to the ~~poses~~ of the charity, in a manner to exclude all ~~tion~~ of a beneficial interest being vested in the ~~ss~~), the trustees have a right to apply all the funds, ~~yond~~ what was disposed of by this decree, to their ~~n~~ benefit; I am of opinion that I cannot do so, and ~~ut~~, on the contrary, I must make an opposite declar-
on.

As to the time from which the account against the ~~ef~~endants should be taken, I must say that nothing ~~n~~ be more satisfactory in an investigation of this ~~nd~~, than to find, that there is no possibility of any ~~itation~~ of bad or corrupt conduct on the part of the ~~ef~~endants. The present Defendants, beyond all ques-
d, have applied this fund just in the manner in which ~~has~~ been applied by their predecessors; in all proba-
ity, they never looked at the original foundation at
but instead of applying it to any beneficial purposes
their own, it is now shewn by the evidence and by
eir answer, and it is admitted by the Attorney-
general that they have applied the funds in a beneficial
manner for the most useful charitable purposes.

It is, therefore, quite satisfactory to me to find, that the Attorney-General confines his claim for an account from the filing of the information, and the account, therefore, must be directed from that time alone, and I may say, that if it had been pressed further back, I think I must have come to the same conclusion; and that I could not, with any justice, have charged this company with applying to its own purposes any of those funds. Every case depends upon its own circumstances; there
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are cases in which the account has been taken from the time when the information of the erroneous application was made known, namely, from the publication of the report of the charity commissioners. Other cases in which it has been directed from the time of filing the information, and others from the date of the decree. Those three periods of time have, according to the various circumstances of each case, been adopted; but I think that which is now proposed by the Attorney-General, is what is quite right to be done in this case.

With respect to the costs, the company have thought fit to have this question tried, in order that they might have the application of this money, according to their own view of what was right. (a) If the costs are asked against the company by the Attorney-General, he must have them.

I think, therefore, there must be a declaration that all this income is applicable to the purposes of the testator's will. The account must be taken from the filing of the information, and the costs must be paid by the Defendants.

(a) *The Attorney-General v. The Attorney-General v. Christ's Hospital, 4 Beav. p. 75.*
The Drapers' Company (Ken- drick's Charity), 4 Beav. p. 72.

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DE WEEVER v. ROCHPORT.

July 14.

A reference was made to the Master, to inquire if the father of the infant Plaintiff was of ability to maintain her, and if not, to approve of a proper allowance for that purpose.

The Master reported that the father was not of ability, and he submitted, that the income of the property in court ought to be paid to the Plaintiff's father for her maintenance and education during her minority.

A petition was presented to confirm the Master's report, and for an order for payment to the father.

The infant Plaintiff and her father were both living in *Demerara*, out of the jurisdiction of the Court.

Mr. *Freeling* in support of the petition.

The MASTER of the ROLLS said, he doubted whether it was the practice of the Court, where an infant and her father were living abroad, to direct payment of maintenance to the father, and he suggested that the order should be, that some person resident in this country should be appointed guardian to whom the money should be paid. He, however, directed the petition to stand over in order that the authorities might to be looked into.

The case was mentioned again, when

Mr.

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Mr. *Freeling* referred to a case of *Bliss v. Putnam* (a) in which the infant and her mother, who was her guardian, were residing in *Canada*, and it was ordered that upon production, from time to time, to the Accountant General of this Court of an affidavit of Mrs. *Putnam*, the mother, that she had duly applied in the maintenance and education of the infant petitioners, all monies received by her on that account, up to the time of making such affidavits, respectively, an allowance of 600*l.* a year should be paid to the attorney for the mother in *England*, during the respective minorities of the infant petitioners, for their maintenance.

The Master of the Rolls now ordered as follows:— that Mr. *De Weever* should appoint an attorney to receive the maintenance, and, upon the appointment of such attorney, the dividends of the funds in Court should be paid to such attorney, half yearly, upon the production to the Accountant General of an affidavit that he had duly applied, in the maintenance and education of the infant, all monies received by him on that account, up to the time of making such affidavits respectively. (b)

(a) *Rolls*, 19th November 1840.

(b) See *Jeffrys v. Vanleswarstwarth, Barnard*, 141. *Lethem v. Hall*, 7 *Simp.* 141. *Jackson v. Hanbury, Jacob*, 265. n. *Logan v. Fairlee, Jacob*, 193. *Stephens v. James*, 1 *Myl. & K.* 627. *Bigg v. Terry*, 1 *Myl. & Cr.* 675. *Wyndham v. Lord Ennismore*, 1 *Ke* 467. and the following two cases.

In re Levinge, 4th July 1797.

The infant was entitled to real estates in *England* and *Ireland* his father was dead.

Infant's mother proposes that *Richard Reynell*, the maternal uncle of the infant, who was resident in *Ireland*, and had been appointed guardian of the infant's estate in *Ireland* by the Chancery there, should be appointed guardian of the estate in *England*.

Order accordingly, Mr. *Reynell* entering into a recognizance

two sureties duly to account; and a commission directed to take the recognizances in *Ireland*. — Reg. Lib. 1796. B. fol. 618.

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In re Daly, 22d May 1798.

Infant entitled to estates in *England* and *Ireland*, his father dead.

His mother resident in *Ireland*, had been appointed guardian of person and estate by *Irish Chancery*.

Order that she be appointed guardian of person and estate in *England*, entering into recognizances to account for what she received, and for a commission to take the recognizances in *Ireland*. — Reg. Lib. A. 1797. fol. 1029.

Same Case, 22d December 1802.

Similar order as to brother of the infant. — Reg. Lib. A. 1802. fol. 142.

DAVIS v. BLUCK.

July 14.
August 1.

IN this case, the Plaintiffs, by their original bill, stated, that *Charles Bluck* alleged himself to be entitled to a moiety of and in certain premises situate in *High Street, Doncaster*, called the Subscription Betting Rooms, consisting of the new betting rooms and other buildings erected thereon, for the residue of a term of twenty-one years, commencing from the 25th of *March 1828*, under a lease granted to *Anne King*, whereby the entirety of the premises were demised to him and *John Goodred* for

Bill ordered, upon motion, to be taken off the file, on the ground that it was a supplemental bill in the nature of a bill of review, which ought not to have been filed without the leave of the Court.

A contract

was entered into for the sale of the vendor's interest in a lease and premises at *Doncaster*, known as the betting rooms, for the remainder of the lease granted by *A.* A bill for specific performance was filed by the purchaser, in which and in the decree the agreement was treated as comprising the premises held of *A.*, and an account of the rents was directed. It turned out that the rooms and premises were partly under *A.* and partly under *B.*, whereupon the vendor filed a second bill, praying a declaration that the whole was comprised in the agreement. Held, however, that the Plaintiff could not, upon a rehearing, obtain the relief asked by the second bill, nor could he, by such second bill, obtain the relief thereby prayed, whilst the decree stood in its present form; that to obtain the relief asked, the original cause must be reheard with the second, and, consequently, that the second bill was a supplemental bill in the nature of a bill of review, which ought not to be filed without leave of the Court.

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for twenty-one years. That the said *Charles Bluck*, alleging himself to be so entitled, signed an agreement in writing, dated the 30th day of *October* 1840, and which was in the following words, *i. e.* :—

“ *Newmarket, October 30th, 1840.* ”

“ *I, Charles Bluck, do agree to sell and assign, and we, James Hollick Davis, and James Adkins, do agree to buy of said Charles Bluck, his half share of the lease and premises, situate in Doncaster in the county of York, known as the Subscription Betting Rooms, for the remainder of a lease granted by Anne King to John Goodered and Charles Bluck, for the sum of 1200*l.*, to be paid by the aforesaid James Hollick Davis and James Adkins as follows: 300*l.* to be paid on the assignment of the lease to the said James Hollick Davis and James Adkins, within twenty-one days from the date of this agreement, 500*l.* to be further paid on or before the 30th of January 1841, and an additional sum of 400*l.* on or before the 20th day of July 1841, making altogether the sum of 1200*l.* of lawful money of Great Britain. Either party failing to perform said agreement, to forfeit the sum of 200*l.* of lawful money of Great Britain. Provided the parties, James Hollick Davis and Charles Adkins, continue in quiet possession of the premises eight years from the date hereof, the said James Hollick Davis and James Adkins agree to pay the further sum of 100*l.* to the said Charles Bluck.* ”

“ *Charles Bluck.* ”

“ *James Hollick Davis.* ”

“ *James Adkins.* ”

Of this agreement the bill prayed a specific performance, and it was asked that the Defendant might produce to the Plaintiffs the *said lease*, and make to the Plaintiffs a proper assignment thereof.

By

By the decree, dated the 7th of *June* 1842, it was ordered, that the agreement of the 30th of *October* 1840 should be specifically performed and carried into execution; the Defendant was to pay the costs of the suit to the Plaintiffs, and the Master was to "set an annual value, by way of rent, on the premises agreed to be sold to the Plaintiffs" by *Charles Bluck*.

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It is now alleged, that during the proceedings in the Master's office to set an annual value, by way of rent, on the premises agreed to be sold, the Defendant *Thomas Henry Bluck* (the legal personal representative of *Charles Bluck* who had died) pretended, that the agreement did not comprise all the subscription betting rooms, but only such part of them as was comprised in the lease granted to *Anne King*.

It was now further stated, that the premises comprised in the lease granted to *Anne King*, were, by indenture dated the 4th of *July* 1828, assigned by her to *Goodered* and *Charles Bluck* who was the Plaintiffs' vendor; and it was alleged, that *Goodered* and *Charles Bluck*, being in the year 1830 desirous of enlarging the premises held under the lease to *Anne King*, obtained from *Robert Liddell* the lease of a stable or outbuilding which adjoined a building of two stories comprised in *Anne King's* lease. The lease granted by *Liddell* was dated the 27th of *September* 1830.

It was further alleged, that after the date of *Liddell's* lease, buildings were made thereon, and the premises were so dealt with, as to be known, together with the premises comprised in *Anne King's* lease, as "the subscription betting rooms." The Plaintiffs thereupon insisting that the agreement of the 30th of *October* 1840 ought to be deemed to comprise, not only the

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the premises comprised in *Anne King's* lease, but also the premises comprised in *Liddell's* lease, filed a bill, which they (on the present argument) desired to have considered as a supplemental bill; and they prayed for a declaration, that the premises comprised in the leases of the 4th of *July* 1828 (being *Anne King's* assignment of her lease), and the 27th of *September* 1830 (being *Liddell's* lease), were and are, as to one moiety thereof, comprised in the agreement of *October 1840*, and that the agreement might be specifically performed in conformity with that declaration.

It was now moved that the second bill might be taken off the file for irregularity.

Mr. *Kindersley*, in support of the motion, contended, that the relief sought by the second bill was different from that obtained by the decree in the first. That it would be necessary to revive the first decree in order to obtain the relief prayed by the second suit; that the second bill was, therefore, in its nature, a bill of review, and ought not to have been filed without the leave of the Court.

That the proceeding was irregular; and that the proper course was to order the second bill to be taken off the file; *Hodson v. Ball.* (a)

Mr. *Pemberton Leigh* and Mr. *Sidebottom*, *contra*.

This is a supplemental bill in aid of the former decree, and not a bill of review. Lord *Redesdale*, in his *Treatise*, says (b), "Where the imperfection of a suit arises from a defect in the original bill, or in some of

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(a) 11 *Sim.* 456.; and 1 *Phil.* (b) Page 61. (4th ed.)
177.

the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely. Thus a supplemental bill may be filed to obtain a further discovery from a Defendant, to put a new matter in issue, or to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose. And this may be done as well after as before a decree; and the bill may be either in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it, or to bring formal parties before the Court, or it may be used as a ground to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which it will be necessary to treat more at large in another place." So in *Dormer v. Fortescue* (a) it is said, "Supplemental bills are often brought even in aid of a decree of this Court, as in a decree to account for want of full directions before; and directions are given under the supplemental bill, that the new matter should be connected with the former decree."

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Here, the property bought was "the subscription betting-rooms and premises;" it therefore comprised the two parts as incorporated together. There was an inaccurate description of the tenure, but this was undoubtedly the property sold. The decree perhaps imperfectly describes the property; and this bill is to supply the defect, and to carry out the decree, according to the real intention of the Court at the hearing.

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(a) 3 *Alk.* 135.

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There is no doubt of the principle, that you cannot file a bill to impeach a decree without leave of the Court; the Court considers its decree right, unless, on the matter being again brought to its attention, it entertains reason to doubt it. *Hodson v. Ball* was quite a different case. The original bill was for a simple account, and was in the nature of an action of *assumpit*; the second bill sought to charge the Defendants with the consequence of wilful default and in *tort*. Lord *Lyndhurst* there observed, “ I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is to carry out the principle of the decree; to give full and complete effect to the decree, as it exists.”

The character of this bill is a supplemental bill, seeking additional but not inconsistent relief, and, therefore, the leave of the Court was not necessary.

*The MASTER of the ROLLS* said, he would read over the pleadings to see whether the Plaintiffs were authorised in filing such a bill as the present without having previously obtained the leave of the Court.

August 1.

*The MASTER of the ROLLS.*

The Defendant has moved that this bill may be taken off the file for irregularity, and the question is, whether it is a supplemental bill in the nature of a bill of review or a supplemental bill filed, as it is said, in aid of the decree. I am of opinion that this is a supplemental bill, in the nature of a bill of review.

There can, I think, be no doubt, but that the title stated in the bill and the agreement therein set forth, as literally

literally interpreted, have reference only to the premises comprised in the lease therein stated to have been granted to *Anne King*, or to have been assigned by her to *Goodered* and *Charles Bluck*. The premises comprised in the agreement are stated to be premises comprised in the lease granted to *Anne King*, and no others are noticed.

1843.

DAVIS

v.

BLUCK.

The original bill and the decree treat the agreement as comprising the premises comprised in *Anne King's* lease, and the Plaintiffs could not, by having the cause reheard, obtain the relief which is asked for by the supplemental bill; and I am of opinion that they cannot, by the supplemental bill, obtain the relief thereby asked for, whilst the decree in the original cause stands in its present form.

To obtain the relief which is asked, the original cause must be reheard, at the time when the supplemental cause is heard; and the whole matter being before the Court, the full relief to which the Plaintiffs may be entitled will be considered. I think that a supplemental bill thus brought to supply a defect in the pleadings and decree in the original cause, and the decree upon which it is to be obtained on a rehearing of the decree in the original cause, is a supplemental bill in the nature of a bill of review, which ought not to be filed without the leave of the Court.

I must therefore grant the motion with costs.

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See also *Wilson v. Todd*, 1 *Myl. & Cr.* 42.; and *Swan v. Swan*, 8 *Price*, 518.



1843.

April 3.

## KIRKMAN v. HONNOR.

Substituted  
service of an  
injunction  
ordered.

**I**N August 1842, an injunction was granted, restraining ~~the~~ the Defendant from receiving monies on some ~~Portuguese~~ ~~titles~~.

The Plaintiff being unable to serve the injunction ~~in~~, and the Defendant's solicitor in the cause refusing ~~to~~ accept service, on the ground that he had no authority ~~to~~ to do so,

Mr. Rogers moved, that service on the Defendant's solicitor might be deemed good service.

*The Master of the Rolls* made the order.

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See *Pr. Reg.* 252., *Hinde*, 595.; *Pearce v. Crutchfield*, 14 ~~V.~~ 206.; *Pulteney v. Shclton*, 5 *Ves.* 147.

REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN  
THE ROLLS COURT.

1843.  
March 30.  
April 7.

SHERWOOD *v.* WALKER.

**J**OHN WALKER was, under the will of his father, who died in 1814, entitled to the residuary estate. His mother *Ann Walker* and another were executors of the will. *John Walker* at the death of his father was an infant, but, having in 1830 attained twenty-one, he, in the same year, instituted a suit against the executors for an account and administration of his father's estate. A compromise of the suit was arranged, which was carried into effect by a deed executed in September 1831, made between Mrs. *Walker* of the first part, *John Walker* of the second part, and trustees of the third part; and thereby *John Walker*, in consideration of the covenants therein contained on the part of Mrs. *Walker*, assigned to her all his interest in any property to which he was entitled under his father's will; and Mrs. *Walker* thereby covenanted with her son, that she would, within two months, pay 400*l.* in discharge of two no payment was made to them. The son became insolvent. Held, that the mother was not liable to pay the 170*l.* to the assignees.

1843.

~~~~~  
 SHERWOOD
 v.
 WALKER.

two of his debts, amounting together to 229*l.* 10*s.*, and pay the remainder of the 400*l.* among such of his creditors "as should be willing to accept the same in full discharge of their respective debts, and should signify their consent to Mrs. Walker on or before the 1st of November next ensuing;" and Mrs. Walker thereby covenanted with the trustees, that she would, on or before the 1st of December next, pay to them 800*l.* on certain trusts for John Walker, and his wife and children.

At the time of the execution of this agreement, a list of debts then owing by John Walker was handed to his mother, which amounted to about 505*l.* inclusive of the two debts which were to be paid in full.

Mrs. Walker paid the 800*l.* and 229*l.* 10*s.*, and notice was given to the creditors, that the 170*l.* 10*s.* (the residue of the 400*l.*), would be divided among such of them as should accept the same in full discharge of their debts, and should signify their consent before the 1st of November, but none of them assented thereto, and Mrs. Walker therefore made no distribution of the 170*l.* 10*s.*

John Walker was arrested in November 1831, and was discharged under the Insolvent Act in July 1832. His assignees filed this bill against Mrs. Walker to recover the 170*l.* 10*s.* in her hands.

Mr. Pemberton Leigh and Mr. Smythe for the Plaintiffs.

John Walker was entitled to the whole of his father's estate, which he assigned to his mother in consideration of the 800*l.* settled, and the 400*l.* to be applied for his benefit. As the creditors did not consent to accept the

the provision intended for them, there was a resulting trust in favour of *John Walker*, and not for his mother, who had received the full consideration for it. Where creditors are not parties to the arrangement, a trust for the payment of a person's debts, is a trust for the person himself. *Wallwyn v. Coutts* (a), *Garrard v. Lord Lauderdale*. (b) Here the particular mode of paying the fund has failed, it therefore belongs to the person for whose benefit it was to be applied, and has passed to his assignees under the insolvency.

1843.
SHERWOOD
v.
WALKER.

Mr. George Turner and Mr. F. Bayley, contra.

The question is this: is there or not a covenant in this deed for the payment, at all events, of this sum of money; if there is, the Plaintiffs' remedy is at law and not in equity. The sum of 170*l.* was not to be paid at all events, but only in case the creditors consented to accept it in full discharge of their debts. The event has not happened on which payment was to be made, and, therefore, the Defendant is not liable either at law or in equity. This was a mere family arrangement between the mother and her son, to relieve the son from his pressing liabilities; but if this suit were to succeed, the sum in question will not only be applied in payment of other debts than those agreed upon by Mrs. *Walker*, and on different terms, but *John Walker* will be left still liable to those very debts, from which it was the object of his mother to relieve him.

They cited *Toovey v. Milne*. (c)

The

(a) 3 *Mer.* 707. (c) 2 *Barn. & Ald.* 685.
(b) 3 *Sim.* 1.; and 2 *Russ. &*
Myt. 451.

1843.

SHERWOOD
v.
WALKER.

The Master of the Rolls.

The question arises on the construction of the deed executed in *September 1831*, whereby an arrangement was come to between *Ann Walker* and *John Walker* her son, she being the legal personal representative of her late husband, and he being entitled to the personal estate.

It seems that a suit had been instituted for the administration of the personal estate, and that the parties came to a settlement of the questions between them, upon the terms stated in the deed. It does not appear that any creditor signified his consent, or that there was any offer of any one of the creditors to accept any portion of the remaining sum in satisfaction of his debt. *John Walker* became insolvent, and this bill is filed by his assignees to recover the 170*l.*, the residue of the money, and the principal ground on which this claim is rested is, that there is a resulting trust in favour of *John Walker*.

I am of opinion that there is no such resulting trust. The intention was plainly to settle family disputes then existing, and to apply 400*l.* in a specific and particular manner in payment of the son's creditors, viz. in payment among such of them as should be willing to accept the same in full discharge of their debts, and should signify their consent. They did not assent, and I therefore think that the 170*l.* 10*s.* did not become payable in consequence of the events contemplated not having taken place.

Affirmed by the Lord Chancellor 24th *February 1844.*

1843.

ALEXANDER v. ANDERDON.

*May 31.
June 3.
July 29.*

IN this case the Defendant *Richard Brough Anderdon* presented an original and also a supplemental petition, the original petition praying a declaration that certain matters of business, in respect of which Mr. *Henry Jackson*, a solicitor, claimed to be entitled to charge him for costs, were unauthorized by the petitioner, and that such parts of the bills of costs as related to such business were fraudulent and improper, and ought not to be charged, and that the rest of Mr. *Jackson's* bills might be taxed; and the supplemental petition praying that it might be referred to the Master to ascertain what was due to Mr. *Jackson*, generally, upon his bills of costs, on the footing of an alleged agreement, and that it might be declared that a certain promissory note had been satisfied. Both the petitions prayed that Mr. *Jackson* might be restrained from proceeding at law in respect of the matters alleged.

The Court has no authority, upon a petition by a client against his solicitor, to give relief founded on a special agreement.

Mr. *Pemberton Leigh*, Mr. *Turner* and Mr. *Mylne*, in support of the petition.

Mr. *Kindersley* and Mr. *Bagshawe*, contra.

The MASTER of the ROLLS.

July 29.

On the hearing of the petitions it appeared, that, according to the allegations of the petitioner, the relation subsisting between him and Mr. *Jackson* was not the ordinary relation subsisting between solicitor and client; and that the ground on which he claimed relief rested,

E e 3 principally,

1843.
~~~~~  
ALEXANDER  
v.  
ANDERDON.

principally, on some special agreement, or on some  
special understanding, upon which he alleged Mr. Jackson  
had attended to his business.

I consider it to be settled, that, upon a petition presented by the client against the solicitor, the Court has not authority to give relief founded on a special agreement, and on that account, it appeared to me probable, that the petitions could not be sustained, but as the dismissal of the petitions would leave it open to the petitioner to file a bill for the same matter, upon which bill, if there was a good foundation for his claim, he might obtain relief, I was desirous to give the parties an opportunity of settling the matter, in some way that might prevent a prolonged litigation.

As the opportunity has not been taken advantage of, it has become necessary to dispose of the petitions; and after a careful consideration of the petitions and of the evidence, I am now of opinion, that the petitions cannot be sustained, and must be dismissed.

Upon the evidence, I cannot say that the petitioner may not, under some such agreement or understanding, as he has alleged, be entitled to some relief, if applied for in a proper form; but on these petitions, I cannot say that there are merits, upon which I could decide that Mr. Jackson is not entitled to issue execution on the judgments which he has obtained, and if I had come to that conclusion, I do not think that I have jurisdiction to restrain him. As the petitions charge fraud and misconduct, and the case is not supported by sufficient evidence, or shewn to be within the jurisdiction, I think that the petitions must be dismissed with costs.

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See *In re Smith*, 4 *Beav.* 309.

1843.

## NOWELL v. WHITAKER.

June 25.

**H**E Defendant having been brought to the bar of the Court in contempt for want of answer, and his **e**rt<sup>y</sup> being alleged as a reason for his default, a **r**ence was made to the Master, under the act (a), to **u**ire whether, by reason of poverty, he was unable to **p**loy a solicitor to put in his answer. The Master **r**orted that he was not unable by poverty, &c.

**T**he Plaintiff proceeded to take the bill *pro confesso*, on the 8th of June, the V. C. *Knight Bruce* made order for taking the bill *pro confesso*, without **l**ice to the Defendant applying to the Court, within **1** days, for leave to put in his answer.

**T**wo days after, the Defendant obtained, at the Rolls, **o**rder of course to defend the suit *in formā pauperis*. **D**e Defendant, on his application for the order, wholly **P**ressed the circumstances which had previously taken **l**ace in the cause.

**M**r. *Elmsley* now moved to discharge the order to defend *in formā pauperis*, on the ground that it had been obtained as of course, upon a suppression of material circumstances.

A Defendant obtained a reference under the contempt act, to enquire whether by poverty he was unable to answer. The Master reported in the negative. By an order of the Vice-Chancellor the bill was taken *pro confesso*, without prejudice to the Defendant applying within ten days to put in his answer. The Defendant, suppressing the previous circumstances, then obtained an order of course for leave to defend *in formā pauperis*. The order was discharged.

**M**r. *M'Christie*, *contrā*.

**T**he **M**ASTER of the **R**OLLS said, that if the Defendant, on his application, had stated the previous circumstances

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(a) 11 *G. 4.* and 1 *W. 4.* c. 36. s. 15. rule 6.

*E e 4*

1843.  
NOWNELL  
v.  
WHITAKER.

as he ought, they would have received due consideration; but having obtained the order as of course, and upon a suppression of material facts, the motion must, on that ground, be granted, but without prejudice to any other application.

May 5.

EGREMONT v. COWELL.

A cause came on in 1839, and was ordered to stand over for want of parties. A bill of revivor and supplement was afterwards filed, stating that *A.*, the sole Plaintiff, had died in 1838, insisting that the order of 1839 was a nullity, and praying a revivor. A common *ex parte* order to revive was obtained on petition, placing the cause "in the same plight and condition as at the death of *A.*" The Defendant

moved to discharge the order on the ground that the order of 1839 must be discharged before the cause could be put in the same plight as at the alleged death of *A.* Held, however, that it was regular.

THE original suit of *Vickers v. Cowell* having come on for hearing, on the 18th day of *July 1839*, an objection was taken for want of parties, which was allowed. An order was then made, whereby the cause was ordered to stand over with liberty to the Plaintiff to amend by adding parties. (a)

Instead of amending, a bill of revivor and supplement was filed by an administrator, stating that the Plaintiff *Ann Vickers* had died on the 15th of *August 1838* (nearly a year previous to the hearing), and insisting that as she was dead at the hearing of the cause in *July 1839*, the order then made was a nullity. It stated also supplemental matter, to shew that the persons who had been held to be necessary parties, were not so, under the circumstances; and it prayed that the suit might be revived and placed in the same plight as at the death of *Ann Vickers* the Plaintiff, and that the order of *July 1839* might be set aside.

(a) 1 *Beavan*, 529.

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The Defendant having appeared, the Plaintiff, after the expiration of eight days (*a*), and on the 5th of *April 1843*, obtained, as of course, an order to revive the suit, and place it “*in the same plight and condition as the same was in at the death of Ann Vickers.*”

1843.  
EGREMONT  
v.  
COWELL.

The Defendant now moved to discharge the order.

Mr. *Pemberton Leigh* and Mr. *Beavan*, in support of the motion. The 10th Order of *December 1833*, by which, “If the Defendant shall not within eight days after appearance to a bill of revivor, shew cause by plea, answer, or demurrer filed, the Plaintiff shall be entitled, as of course, upon motion or petition, to the common order to revive,” &c. does not apply to a case like the present, where the object of the bill is, not to continue the suit from the point at which it left off, but first to set aside the order of the 18th of *July 1839*, and then to place the cause in the state in which it was in *August 1838*, when it is alleged the Plaintiff died. Until the order of 1839 has been set aside, which can only be done at the hearing, the cause cannot be placed in the same plight as it was in 1838.

It appears from *Hinde's Practice* (*b*), that the common order to revive can only be obtained where the bill is *merely* for a revivor, and only upon reviving all orders made. It is there stated, “A cause cannot be revived in part, but the whole proceedings, bill, answer, and *orders* made in the cause must stand revived, for the revivor is but a continuation of the same suit, and it cannot be a continuation of the same, unless it proceeded where the other left off.” “In a bill of revivor *merely*, the Defendant must appear &c.; and in eight days after

appearance

(*a*) *Ord. Can. 46.*

(*b*) *Page 48.*

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appearance, either shew cause against the bill, or submit to answer, and in default the suit may be revived without answer, if none be required, upon motion as a matter of course." The Orders of 1833 did not alter the former practice, for having extended the time for answering to eight weeks, and it being desirable not to extend the time for obtaining the common order to revive, the latter part of the 10th Order provided for it, but it does not extend the right of obtaining, *ex parte*, the common order to revive to cases not within the rules according to the old practice. The 10th Order, therefore, only applies to "a bill of revivor merely."

Costs were improperly occasioned by bringing ~~the~~ cause to a hearing after an abatement. By reviving ~~ex~~ *parte* the Plaintiff escapes his liability to pay them, for the Court would only have set aside the order in ~~July~~, 1839, upon payment by the Plaintiff of the costs of ~~the~~ other parties.

Mr. *Koe* and Mr. *Shee*, *contrâ*. The order is perfectly regular, for in all cases where the suit abates, whether the abatement requires merely a bill of revivor, or a bill of revivor and supplement, the suit must be revived by an order to revive, and it is not regular to wait till the hearing, and then to revive the suit by decree. (a) Unless the Plaintiff had revived, he would have been unable to go on with the supplemental matter. [The MASTER of the ROLLS. — Does not the order to revive leave the equity of the bill open?] Yes; the Defendant may, at the hearing, shew that there is no title to revive. The only way to prevent the order to revive is by plea or demurser.

Mr. *Pemberton Leigh*, in reply. It is not necessary to discuss what is the rule in ordinary cases: here the case

(a) 3 *Daniell's Pr.* 217.

se is very peculiar and special, and the supplemental  
rt has not been occasioned by the abatement, but is  
ege to have taken place since. The objection to this  
der is, that it is a partial revivor of the suit, it omits  
portion of the proceedings which the Plaintiff thinks  
jectable, and leaves the last order unrevived, which  
treats as a nullity.

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v.  
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*The Master of the Rolls.*

The original cause having been brought on, was  
dered to stand over with liberty to amend by adding  
rties; it now appears that nearly a year before the  
der was made, the Plaintiff had died, so that the  
nging on of the cause at that time was an irregular-  
ity on the part of the solicitor, who ought to have  
own whether his client was living or dead, and notice  
which fact must be imputed to him.

A bill of revivor and supplement has been filed stating  
e abatement, which not only insists that the order  
eviously made was a nullity and void, but prays a  
eclaration to that effect, and that the cause may be  
revived.

The real difficulty is as to the costs of the previous  
proceedings; but as the Plaintiff has stated them all by his  
bill, the Defendant will have the opportunity of demand-  
ing, by his answer, such costs as he may be entitled to.

I cannot say that the order to revive is irregular: it  
was obtained on matters shewing a right to revive,  
and I think I cannot discharge it.

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See *Lewis v. Bridgman*, 2 *Simons*, 465. *Codrington v. Houlditch*,  
5 *Sim.* 287. *Langley v. Fisher*, 10 *Sim.* 349. *Devaynes v. Morris*,  
1 *Myl. & Cr.* 213.

1843.

April 28.  
May 1.

## SIMPSON v. ASHWORTH.

The words "lawful heirs," held, upon the context of a will, to mean "heirs of the body."

A testator, having several children, directed the purchase of an estate for one of his daughters, "for her use and her lawful heirs," to be returned "if she died without lawful heirs," to the other children that had heirs. Held, upon the context, that "lawful heirs" must be construed "heirs of the body:" that the daughter took an estate tail, and that the gift over was also an estate tail.

A testator gave his daughter a sum of money, and directed his executors,

"as soon as convenient after his decease, to purchase an estate," and when she attained twenty-one, she was to receive the money if the land was not bought. There was a gift over. The estate was not purchased, and she invested the money in the funds. Held, on the daughter's death, that the money was impressed with the character of realty, and passed as such.

THE testator, having a son and four daughters, devised one real estate to his son, "and his lawful heirs or assigns for ever," subject to the payment of 10,450*l.* to the testator's daughters.

He then devised a second freehold estate to his eldest daughter "and her lawful heirs," and 1500*l.*; and he devised, similarly, to two other daughters "and their lawful heirs," two other freeholds, together with a sum of money. As to these daughters he declared as follows: — "It is my will and mind, that the lands which I have bequeathed as above to my daughters *Ellen*, *Isabel* and *Agnes*, in case all or any of them die without lawful heirs, the same to return to my other children that have lawful heirs, share and share alike."

He then proceeded to provide for his youngest daughter in the words following: — "I give and bequeath unto my daughter *Catherine*, the sum of 4000*l.*, out of my personal estate, and I here direct my executors to pay her the interest of 2000*l.* till she attains the age of twenty-one years. I likewise direct my executors, or the survivor of them, as soon as convenient after my decease, to purchase an estate not to exceed 2000*l.* for her use and her lawful heirs, and come into possession, with the accumulations arising, at the age of twenty-one

enty-one years. This 4000*l.* to be paid out of my rsonalty at the end of twelve months." In a subsequent part of the will, he proceeded as follows:— It is my will and mind, that when my daughter ~~Catherine~~ attains the age of twenty-one to receive her 100*l.*, if the land above mentioned is not bought, to ve security for 2000*l.*, to be returned if she dies thout lawful heirs, to my son and daughters that have rs, share and share alike, and provided the land be chased, to be returned in the same manner." The testator bequeathed his residuary personal estate to his son.

No estate was purchased for *Catherine* and her lawful heirs as directed by the will. She attained twenty-one in 1785, and received the 4000*l.*, but gave no security for returning the 2000*l.* in the event provided for, and this 2000*l.* she afterwards invested in the purchase of 216*l.* 8 per cents.

*Catherine* married in 1807, previously to which a settlement was executed by her and her intended husband, which recited the purchase of the stock with the 2000*l.* subject to be returned. The stock was settled on her for her separate use for life, and subject thereto, upon the trusts declared by the testator's will. The testator's son was a trustee under this settlement. He survived his co-trustees, and died in 1828, having appointed the Plaintiffs his executors, who thus became possessed of the stock upon the trusts of the settlement.

*Catherine* died a widow, in 1841, without having had any issue.

The bill was then filed by the executors of the son, praying the direction of the Court in the distribution of the fund.

Mr.

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ASHWORTH.

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 v.  
 ASHWORTH.

Mr. *Pemberton Leigh* and Mr. *Little*, for the Plaintiffs, stated that the questions were, first, whether the 321*l.* stock was to be considered realty or personality.

Secondly, what estate or interest *Catherine* took.

And, thirdly, as to the validity and extent of the gift over.

Mr. *Turner* and Mr. *Lewin* for the heirs of two children argued that the stock must be considered as impressed with the character of realty; *Johnson v. Arnold*(a), *Earlom v. Saunders* (b), *Cowley v. Hartstone* (c), and *Hereford v. Ravenhill*. (d)

Secondly, that as the brothers and sisters would be the heirs general of *Catherine*, in the event of her having no issue, the words "lawful heirs," in the gift over to them, must necessarily mean heirs of the body of *Catherine*, and that she therefore took an estate tail. (e)

Thirdly, that the gift over to the brothers and sisters was valid, and gave to them either the fee or an estate tail; *Bailis v. Gale*. (g)

Mr. *Kindersley* and Mr. *Haddan* contended that there had been no conversion of the fund into realty, and that the gift over was valid. They cited *Nicholls v. Skinner*(h), *Hughes v. Sayer*. (i)

Mr

(a) 1 *Ves. sen.* 169.

(g) 2 *Ves. sen.* 48.

(b) *Ambler*, 241.

(h) *Pr. Ch.* 528. 2 *Roper on Legacies*, 470.

(c) 1 *Dow*, 361.; and see *Cookson v. Reay*, 5 *Beavan*, 22.

(i) 1 *P. Wms.* 534. 1 *Jarmain on Wills*, 526.

(d) 5 *Beavan*, 51.

(e) See 2 *Jarmain on Wills*, 238.; and the cases there cited.

Mr. *Koe* and Mr. *Renshaw*, for the real and personal representatives of *Catherine*, claimed the whole of the fund, contending that it was personal estate, the estate being only purchaseable while she was under twenty-one, and if not done, the money itself was to be "received" by her. They contended that the gift over, being on a general failure of "lawful heirs," was void; *Campbell v. Harding* (*a*); and that, therefore, *Catherine* was absolutely entitled. They argued further that, in any event, the stock was only a security for the return of 2000*l.* sterling; and that the surplus value at least belonged to *Catherine's* estate.

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~~~~~  
SIMPSON
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Mr. *Kenyon Parker*, and Mr. *Milne*, for the only surviving child, contended that the fund was impressed with the character of real estate; that *Catherine* took an estate tail, and that the gift over was valid; that the settlement had identified the stock as the produce of the money, and had declared the trust of the whole of it accordingly; that, by reason of *Catherine's* neglect originally to give security for the return of the 2000*l.*, there would have been an equity to treat the investment, as made for the general benefit of the parties entitled under the will, even supposing the settlement had not declared the trust upon that footing.

Mr. *Little*, in reply, contended, that the conversion into realty was only co-extensive with the gifts to *Catherine* and to the son and daughters; which gift, in devises of lands, would make *Catherine* tenant in tail, with remainders to the son and daughters for life; that the words, "that have" heirs, vested nothing in the heirs or in the ancestors, but only limited the class of son and daughters who were to take. That the surplus interest,

(*a*) 2 *Russ. & Mylne*, 390.; and 8 *Bl.* 469.

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interest, after satisfying the above gifts, retained its original character of personality, and not being otherwise disposed of, passed to the residuary legatee; and that the Plaintiffs, as his executors, were therefore beneficially entitled, subject to the life estate of the surviving child in her share of the fund. *1 Jar. on Wills*, p. 553., and the cases there cited.

The MASTER of the ROLLS.

The construction of this will is certainly very doubtful; but according to the best opinion that I can form, I think that this sum was intended to be converted into real estate, and that there is nothing to shew that it was, on any subsequent event, to be reconverted.

It was intended to pass as real estate; and though the testator had provided for the case of his younger daughter attaining twenty-one, in which event it was to be given to her on certain terms, yet it was intended on a contingency to come back; and I think that there is nothing to shew it was not to come back in the character of real estate.

The first question is, what estate is given; and the second what is the effect of the limitation over. The expression "lawful heirs," by itself, would mean heirs general; but it is to be observed that he had used the same words in the previous devise of all the real estates given to the other children in every one of the gifts over. On the construction of these words I am therefore bound to conclude that he did not mean heirs general, but heirs of the body; the consequence of which is, that he has limited the effect of the words "lawful heirs," and makes it heirs of the body: the result is to give an estate tail to the daughter.

As

As to the gift over, I think I must collect he meant the same quantity of estate to go over which he had given in the first instance.

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I think also that the gift over is not too remote.

The result is that the first gift is an estate tail, the gift over is valid, and that gift over is of the same estate previously given; viz. an estate tail.

The plan of the will is the only thing which is clear. He gave the largest real estate to the son, charged with a sum which he contemplated giving to the daughters. He gave to three of his daughters respectively a real estate and a sum of money, and having, (as it has been truly said) exhausted his real estate, and having no other real estate to give to his youngest daughter, he gave a sum of money with a direction to invest part in real estate.

All parties ought to have their costs out of the fund.

1844.

July 5.

PERRY v. TRUEFITT.

A motion being made for an injunction, it stood over with liberty to the Plaintiff to bring an action to establish his right. The Plaintiff neglecting to proceed therein, the motion was refused with costs.

ON the 8th of *December* 1843, the Plaintiff moved for an injunction. (a) The motion was ordered to stand over with liberty to the Plaintiff to bring an action, and either party was to be at liberty to apply.

The Plaintiff not having commenced any such action, the Defendant now moved, that the motion might be refused with costs.

Mr. G. Turner and Mr. James Parker for the Defendant.

Mr. Pemberton Leigh and Mr. Trotter for the Plaintiff.

The MASTER of the ROLLS, having stated that the Defendant was entitled to have the motion refused with costs, the suit was also, at the same time, by arrangement between the parties, dismissed with costs.

(a) *Ante*, p. 66.

1843.

CHAMEAU v. RILEY.

July 13.

A COMMISSION had been issued for the examination of witnesses on the part of the Plaintiff in *France*, in support of the state of facts of the Plaintiff upon an enquiry before the Master.

The depositions were afterwards suppressed for irregularity, with costs to be paid by the Plaintiff, and which, on taxation, were found to amount to 197*l.*

Depositions under a commission having been suppressed with costs, the payment of those costs was made a condition for granting a new commission.

Mr. *Lloyd* now moved, on the Master's certificate, for a new commission.

Mr. *Pemberton Leigh* and Mr. *Kindersley* resisted the application, on the ground that the former costs had not yet been paid.

Mr. *Lloyd*. The Defendant, has taken proceedings in *France* against the Plaintiff, whereby his property has been attached. Either the Defendant has been paid therewith, or the Plaintiff is prevented, by that attachment, from complying with this order and making payment. The Defendant has taken some proceedings since the order; he is not therefore entitled to prevent the Plaintiff's further prosecuting his suit until the costs have been paid. *Onge v. Truelock* (a), was cited.

The MASTER of the ROLLS.

Take the order upon payment of the former costs, but let the Plaintiff have liberty to shew that the amount has been paid, or that the Defendant's proceedings in *France* have prevented his making payment.

(a) 2 *Molloy*, 41.

Ff 2

1843.

July 19.

STANLEY v. BOND.

Where the bill
is amended
before answer,
it is not ne-
cessary to
serve a *sub-
pœna* to an-
swer the
amendments.

Where a bill
is amended
before answer,
the Defendant
is not entitled
to eight weeks
from the
amendment
to answer it.

THE original bill was filed on the 24th of *October* 1842, and on the 24th of *March* 1843, and before the Defendant had answered, an order to amend was obtained. The bill was accordingly amended, but no new *subpœna* was served.

On the 9th of *May* an attachment was issued for want of answer. More than eight weeks had then elapsed since the service of the *subpœna*, but less than eight weeks from the amendment.

Mr. *G. Turner* and Mr. *Toller*, moved to discharge the attachment. They argued that it was irregular, first, because no *subpœna* to answer the amended bill had been served, and, by the original *subpœna*, the Defendant was required to appear in eight days, and "answer concerning such things as should be *then* and there alleged against" him (a), and, therefore, this command could not extend to matters afterwards alleged by amendment.

Secondly, that where a Defendant had not answered, and the bill was amended, he was entitled to the same time to answer the amended bill as he had to answer an original bill, namely, eight and not five weeks, otherwise a Plaintiff might introduce a few trivial amendments to his bill the day after it was filed, and thus reduce the Defendant's time for answering from eight weeks to five. That, therefore, for this purpose, a bill

(a) *Ord. Can.* 60.

bill amended before answer should, under the 10th Order of December 1833 (a), be regarded as an original bill, filed at the time of the filing the amendments; *Spencer v. Bryant.* (b) That, as forty-five days only had elapsed from the amendment, the Plaintiff was premature in issuing the attachment on the 9th of May, and that it ought therefore to be discharged.

Mr. Pemberton Leigh, contra, was not heard by

The MASTER of the ROLLS, who said, I have no doubt of the regularity of the attachment, and I must refuse this motion with costs. If the Defendant had been entitled to any indulgence, he should have made an application for it; the Court would be disposed to grant it, if he could make out a proper case.

The cause being set down, in order that the bill might be taken *pro confesso* under the Orders of the 11th of April 1842 (c),

Mr. Pemberton Leigh proposed to take such decree as he could abide by; but

The MASTER of the ROLLS said, you must take such decree as you are entitled to upon the record (d): you must state your case.

Where a bill is taken *pro confesso*, under the 11th Order of April 1842, the Plaintiff is not entitled to such decree as he can abide by, but to such decree only, as he is entitled to on the record.

(a) *Ord. Can.* 46.

(d) See *Evans v. Williams, ante*,

(b) 9 *Ves.* 231.

p. 118., and *Hayes v. Buerley*,

(c) *Ord. Can.* p. 195.

5 *Dr. & War.* 274.

1843.

July 20.

GIBSON v. NICOL.

A motion for an injunction and receiver being brought on, stood over at the request of the Defendant, who filed his answer the next day. Held, that the Plaintiff might use affidavits subsequently filed, in contradiction to the answer, and which, under these circumstances, must be treated as an affidavit.

A NOTICE of motion having been given for a Receiver and an injunction, and affidavits having been filed in support, the motion, at the request of the Defendant, was directed to stand over, to enable him to put in his answer, which he did the next day.

Subsequent affidavits were filed by the Plaintiff, in respect of title, and in contradiction of the answer, and a question was raised whether they could be received.

Mr. *Pemberton Leigh* and Mr. *Wood*, for the Plaintiff.

Mr. *Kindersley* and Mr. *Calvert*, contra.

Mr. *James Parker* and Mr. *Rolt*, for other parties.

The Master of the Rolls, under these circumstances, thought that the answer was to be treated as an affidavit.

See *Maden v. Veavers*, 5 *Beav.* 512. *Norway v. Rowe*, 19 *Ves.* 143. *Morphett v. Jones*, *Ib.* 550. *Shirreff v. Barnard*, 8 *Sim.* 161. *Smith v. Cleasby*, 10 *Sim.* 93. *Barrett v. Tickell*, *Jac.* 154. *Clapham v. White*, 8 *Ves.* 35. *Lloyd v. Jenkins*, 4 *Beav.* 230.

1843.

STANLEY v. BOND.

July 28.

THE bill was filed for the delivery up of securities alleged to have been improperly obtained by the Defendant from the Plaintiff, and on which he had commenced proceedings at law.

The bill having been taken *pro confesso* (a) against the Defendant,

Mr. Pemberton Leigh asked that the Defendant might be ordered by the decree to pay the costs of the proceedings at law: he submitted that though the bill did not pray for them, yet that the Plaintiff was entitled thereto under the prayer for general relief.

The Master of the Rolls.

You are to have such decree as is just; and I think it is just that you should have the costs of the proceedings at law.

(a) See *ante*, p. 421.

1843.

Court
Feb. 11.

A trustee admitted he had sold out trust stock, but he stated that he had invested the produce in other securities. A motion was made before decree, that he might repurchase the stock and transfer it into Court. Held, that the Court could make no such order.

FUTTER v. JACKSON.

THE bill was filed by parties interested in the estate of the testator, who died in 1828. It alleged that the debts and legacies had been paid; that the residue had been invested in the sums of 2606*l.* 11*s.* 9*d.* 3*½* per cents. and 478*l.* 8*s.* 9*d.* consols; and that the Defendant, the trustee and executor, had, in 1841, in breach of trust, sold out these funds and applied the produce to his own use. The bill sought to charge the Defendant with these sums.

The Defendant, by his answer, stated his belief that the debts and legacies had been paid; and that, at the latter end of May 1841, in consequence of the high value of the public funds, and in the hope of increasing the trust estate, he did sell out the sums of 2606*l.* 11*s.* 9*d.* 3*½* per cent. and 478*l.* 8*s.* 9*d.* consols, "and temporarily invested the produce thereof in other securities." The Defendant gave no further explanation of the manner in which the produce of the sales had been applied or invested.

A motion was now made that the Defendant might repurchase and transfer into Court these two sums.

Mr. *Pemberton Leigh* and Mr. *Parsons*, for the motion, contended, that, as the Defendant had admitted the possession of the trust funds, and had sold them out, and as he had not accounted for the produce, or shewn that it had been properly invested and secured, he was clearly liable to replace it, and that it ought at once to be brought into Court.

Mr.

Mr. Kindersley and Mr. Elderton, *contra*, contended that there was no such admission of the possession of the fund as to entitle the Plaintiff to this order on motion before the hearing. That, as the answer stated that the fund had been reinvested, the Court must assume that the fund was now upon a proper investment, and that to make such an order as that asked on an interlocutory application was contrary to the practice of the Court.

The Master of the Rolls.

I am asked, on motion, to order the Defendant to purchase stock, and then transfer it into Court. I am of opinion that this Court cannot make any such order.

I cannot give credit to the statement that the funds have been properly invested. Though the Defendant has not been asked by the bill, still he would do well to explain the matter.

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FUTTER
v.
JACKSON.

See *Meyer v. Montriox*, 4 *Beavan*, 343. and the cases there cited.

1843.

Feb. 24, '43.

HARRIES v. LLOYD.

A. being entitled to three debts, covenanted with *B.*, that in case he received them in full, he would pay him 1000*l.*, but in case he should receive part only, he would pay one-sixth of the sum recovered.

A. received one of the debts, which he wholly retained.

Afterwards, and within three months before *A.*'s imprisonment and taking the benefit of the Insolvent Act, he (without pressure) assigned one of the debts to *B.*, to secure one-sixth of the debt recovered and those still unpaid. It was set aside as fraudulent under the act.

Held also, that *B.* had not, as against the insolvent's assignees, any lien on the remaining debts, for the one-third of the first debt improperly retained by *A.*

THIS bill was filed by the assignee of an insolvent debtor, to set aside a deed alleged to have been voluntarily executed by him, within three months before the commencement of his imprisonment.

By the Insolvent Debtors' Act (a) it is enacted, "That if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, &c. to or in trust for any creditor, every such conveyance, &c., shall be deemed fraudulent and void as against the assignees. Provided always, that no such conveyance, &c., shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so transferring, &c., of petitioning the said Court for his or her discharge from custody under this act."

The circumstances under which the assignment took place were as follows:— In 1835 *David Williams* was entitled to three debts, one of 3900*l.* due from *Sackville Gwynne*, another of 2000*l.* due from *W. Rice*, and the third of 1060*l.* due from *Sackville Gwynne* and *Elizabeth Lewis*.

On the 2d of June 1835, *David Williams*, upon the marriage of his daughter with *William Jones*, executed a settlement,

(a) 7 G. 4. c. 57. s. 32. re-enacted by the 1 & 2 Vict. c. 110. s. 59.

any lien on the remaining debts, for the one-third of the first debt improperly retained by *A.*

a settlement, by which he covenanted with *David Lloyd* and *Stephen Jones* that in case the said several sums of 3900*l.*, 2000*l.*, and 1060*l.* should be recovered in full, and not otherwise, he would, within six months next after such recovery, pay to *Lloyd* and *Jones* the sum of 1000*l.*; but in case he should not be able to recover and receive those sums in full, then he would, at the time and in manner thereinbefore mentioned, pay to *Lloyd* and *Jones* one-sixth part of and in such part or parts of the three sums as he should be able to recover; the amount was to be held by the trustees upon the usual trusts of a marriage settlement.

In *May* 1837, the Plaintiff commenced an action at law against *David Williams*, and in *July* 1837 obtained a verdict for 2750*l.*, subject to a reference. The reference was proceeded in, and, on the 16th of *December* 1837, the amount due from *David Williams* was ascertained by the arbitrator; he made his award in *January* following, thereby awarding 2445*l.* to the Plaintiff. For this sum *David Williams* was arrested on the 10th of *March* 1838, and he thereupon took the benefit of the Insolvent Act.

In the meantime, however, and on the 19th of *December* 1837, *David Williams* assigned the bond debt of *Sackville Gwynne* and *Elizabeth Lewis* for 1060*l.* to *David Lloyd* and *Stephen Jones*, upon trust to retain 383*l.* 6*s.* 8*d.* (being one-sixth of *Rice's* debt of 2000*l.* which had been received by *David Williams* previous to *November* 1837, and had been wholly retained by him), and such further sums as should be equal to one-sixth of the sums received on the other debts of 1060*l.* and 3900*l.* The assignment having been executed within three months before the commencement of the imprisonment,

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ment, this bill was filed to set it aside, on the ground of its being voluntary.

The third debt of 3900*l.* was considered desperate, and had been sold for 200*l.*

The case alleged for the defence was this: That *William Jones*, on or about the month of *November 1837*, had discovered that *David Williams* had received the sum of 2000*l.*, one of the sums comprised in the marriage settlement, and one-sixth part whereof ought to have been paid and invested upon the trusts of that settlement, and he thereupon applied to *David Williams*, and requested him to pay over the sixth part of such sum to the trustees of the settlement, and pressed him further to secure the due payment, in like manner, of the sixth part of such further sums as should be received out of the other sums of 3900*l.* and 1060*l.* That *David Williams*, having applied the whole of the sum of 2000*l.* to his own purposes, and being then unable to pay over such sixth part, did, upon the application and instance of the Defendant *William Jones*, and not voluntarily or fraudulently, agree to secure the due payment of the said sixth part thereof, and also of the other sums which might thereafter be received, by an actual assignment to the trustees of the settlement of the debt of 1060*l.*, and the security for the same, upon express trusts for that purpose; and accordingly, and sometime in the month of *November 1837*, instructions were given by *William Jones* to Messrs. *Jones and Bishop*, as the solicitors of *William Jones*, to prepare such assignment.

The only proof of the insolvency was the schedule in the Insolvent Court, which evidence being objected to by the Defendants, was received *de bene esse*.

Mr.

Mr. Pemberton Leigh and Mr. Freeling, for the Plaintiff, contended, that as the deed had been executed without pressure, within three months of the imprisonment, it was therefore void. *Stuckey v. D'eeue* (a), *Herbert v. Wilcox* (b), *Binns v. Towsey* (c), *Davies v. Acocks* (d), *Becke v. Smith* (e); and see *Margareson v. Saxton*. (g)

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That it was unnecessary to shew that the debts of the insolvent exceeded the assets at the time; *De Tastet v. Le Tavernier* (h); that if there existed any doubt, an inquiry should be directed; *Townsend v. Westacott* (i); and that the trustees of the settlement had no lien on the debts for the sixth of the 2000*l.*; *Watson v. The Duke of Wellington*. (k)

Mr. Kindersley and Mr. James, contra. To avoid an assignment under this act, it must be proved to have been made spontaneously, and without any pressure; *Arnell v. Bean*. (l) Here there was no spontaneous act on the part of the insolvent; he did no more than he was liable to do, and what he would have been compelled to do, if a suit had been instituted against him for that purpose. He had received 2000*l.*, one sixth of which ought to have been paid to the trustees, and under the settlement, the trustees had a lien on the other debts for payment of the sums agreed by the settlor to be paid. There was no fraud in perfecting the equitable lien, and such an act is not sufficient to avoid the transaction. *Mogg v. Baker*. (m)

There is no proof of insolvency; the schedule is not evidence as against the parties claiming under the assignment.

(a) 2 <i>M. & K.</i> 190.	(b) 1 <i>Keen</i> , 161.
(b) 6 <i>Bing.</i> 203.	(i) 2 <i>Beavan</i> , 340.
(c) 7 <i>Ad. & E.</i> 869.	(k) 1 <i>Russ. & M.</i> 602.
(d) 2 <i>C. M. & R.</i> 461.	(l) 8 <i>Bing.</i> 87. and 1 <i>Moor. & Scott</i> , 151.
(e) 2 <i>M. & W.</i> 191.	
(g) 1 <i>Y. & C. (Ex.)</i> 525.	(m) 3 <i>M. & W.</i> 195.

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sigment. A settlor himself might, in the Insolvent Court, have made statements purposely to avoid the deed.

The Master of the Rolls.

Sometime previous to *November 1837*, but when is not stated, *David Williams* received the 2000*l.* due from *Mr. Rice*; he committed a breach of covenant by not paying over 333*l. 6s. 8d.*, or one sixth part to the trustees of the settlement. It is said, that about this time and before the completion of the reference to arbitration, application was made by the parties claiming under the settlement for some security for this 333*l. 6s. 8d.*, and that the deed of the 19th of *December 1837* was in consequence executed.

That the deed of the 19th of *December 1837* was executed within three months before the commencement of the imprisonment, is not disputed; but two points are raised, *first*, that it was not voluntary; and, *secondly*, that *David Williams* is not proved to have been in insolvent circumstances at the time.

As to the first question, it is said that it was not voluntary, because *David Williams* gave to the parties claiming under the settlement no more than what they were entitled to before; that he, being bound by covenant to pay to the trustees one-sixth of the monies recovered, did, in order to repair the breach of trust, assign the 1060*l.* to the trustees, who were to retain thereout 333*l. 6s. 8d.*, (being one sixth of the 2000*l.*), and then to retain one-sixth of the other sums. Was this any more than what the trustees were entitled to? It would have been an absurdity to have executed this deed, if the parties were entitled to what it gave independent of the deed. I am of opinion, that it was intended

tended to give a benefit to the parties claiming under the settlement which they had not before, and that it was their intention to put themselves in a better position than the other creditors, and to obtain for themselves an additional benefit. I think the deed was voluntary, and that it was not the less voluntary, because the parties called on the insolvent for the additional security; being voluntary it is void, provided the party was at the time in insolvent circumstances.

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~~~~~  
HARRIS  
a.  
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The next question then is, whether the insolvency is proved, and I think that it is not sufficiently shewn to me that *David Williams* was insolvent at the time. His schedule alone is produced, but this does not enable me to adjudicate on the point without an inquiry.

Mr. *Kindersley* admitted the insolvency.

*The MASTER of the ROLLS.*

Then the assignment must be declared void as against the Plaintiff.

The Defendants having claimed to have a lien on the 1060*l.*, for the 333*l.* 6*s.* 8*d.*, (being one sixth of the 2000*l.* received by *David Williams*,) the case came on to be argued as to that remaining point.

Feb. 25.

Mr. *Pemberton Leigh* and Mr. *Freeling* contended that there was no lien on one debt for the monies received in respect of another. That there had been a mere breach of covenant, in respect of which the Defendants must come in as creditors under the insolvency.

Mr. *Kindersley, contra*, contended, that assuming the three debts could not be received in full, the trustees of

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of the settlement were entitled to one sixth of what was received, and had a lien on the whole for that amount.

Mr. *Pemberton Leigh* in reply.

*The Master of the Rolls.*

The question is, what was the intention of the parties? it seems to have been this: if all three debts were received, 1000*l.* was to be paid to the trustees of the settlement, but if part only was received, then one sixth of the sum actually received was alone to be paid to them. What happened? one sum of 2000*l.* was received by *David Williams*, and was applied by him to his own use, and no part was paid over to the trustees of the settlement; he thereby committed both a breach of trust and a breach of covenant.

I do not mean to say that, in this state of things, and to prevent the further breach of trust, the persons claiming under the settlement might not have filed their bill, and, by means of the equitable jurisdiction of this Court, have prevented *David Williams* from receiving any further part of the debts, and by getting the funds into Court, they might not have worked out their equity; but before any relief had been granted, or any order had attached on the funds, *David Williams* became insolvent, and ceased to have any control over the property. It became vested in other persons for the benefit of his creditors, so that any right established by this Court on the funds, would be to the prejudice of those creditors.

I do not think that the trustees of the settlement are entitled to have the 1060*l.* applied in satisfaction of the 933*l. 6s. 8d.* They will however be entitled to one sixth of the 1060*l.* when received.

THE object of this bill was to set aside a release

executed by the Plaintiffs in 1823, and to have

accounts of the estate of the testator *James Craig*, which at his death was wholly embarked in a partnership

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March 7.

27, 28.

March 7, 9.

April 3.

April 3, 4.

MILLAR v. CRAIG.

**T**HE object of this bill was to set aside a release executed by the Plaintiffs in 1823, and to have accounts of the estate of the testator *James Craig*, which at his death was wholly embarked in a partnership (business), taken, as if no such release had been executed, for liberty to surcharge and falsify such account.

**T**he testator *James Craig* carried on a very extensive business as a merchant, in partnership with *Joseph Corrie*, down to the month of March 1804, when the latter retired from the concern.

**J**ames *Craig* afterwards took his nephew into partnership. The period at which this partnership commenced and the loss of books and documents, the Court declined opening the accounts altogether, but gave liberty only to surcharge and falsify.

A stipulation that interest should be allowed on the capital of partners presumed under the circumstances.

In a partnership between *A.* and *B.* interest was allowed on the capitals. *C.*, who was a clerk and relative, was cognizant of the terms on which this partnership was carried on. *B.* retired, and *A.* and *C.* continued the business: the whole capital embarked therein belonged to *A.* There was an absence of all proof of any agreement between *A.* and *C.* in respect of interest on capital. *D.* and *E.* were afterwards admitted into the business, and an interest account of capital was then resumed. Held, under these circumstances, and from the knowledge that *C.* had of the terms on which the first partnership had been carried on, that it must be assumed that interest on capital was to be allowed in the second partnership.

Partnership accounts having been directed to be taken by the Master, in a case in which some of the books had been lost, the Court directed the Master, if it should appear in taking the account that any necessary books, &c. should be wanting, to report the same specially; and whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts.

Where a release has been executed, and the parties have for a long space of time acquiesced in it; the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved, may have a very considerable effect in the consideration of the question, whether the release was fairly obtained.

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 v.
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menced was a matter of controversy between the parties to this cause, the Plaintiffs alleging it to have been about the year 1810, and the principal Defendant, on the other hand, contending that it commenced in 1804, when *Corrie* retired.

The business was however carried on by *James* and *John*, but with the capital of *James*, until 1814; *Charles Nicholls* and *William Lewis* were then taken into the partnership, and that partnership continued down to the death of the testator *James Craig*, which happened in *January* 1818.

The testator, by his will, bequeathed his residuary estate to *John Craig*, but if he should die without issue living at the time of his death (which happened), then he bequeathed the residue principally to the Plaintiffs, and he appointed *Ann Craig*, the said *John Craig*, *William Millar* and the said *Charles Nicholls*, his executors, who all proved his will. The business was continued after his death by the surviving partners.

In 1821, an account of the testator's estate was made out by an Accountant, which *William Millar* the executor was pressed by the three other executors to sign, but having declined doing so, another account was thereupon made out and passed at the legacy duty office by the three other executors.

John Craig the nephew died in *January* 1823, having appointed the Defendant *James Craig* his executor and residuary legatee. After the death of *John Craig*, the representatives of *James*, proposed to the residuary legatees, who resided in *Scotland*, to divide the residue on the basis of the account passed at the legacy duty office, which shewed that the testator's estate consisted of

of 38,266*l.*, and that the residue, after deducting certain charges, amounted to 22,251*l.* This being agreed to, the amount was divided between the residuary legatees, and they, in *July* 1823, executed a release to the executors of all claims, &c. It did not appear that any explanations were then given of the accounts, or that they were vouched.

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The Plaintiffs, as they alleged, subsequently discovered numerous and important errors and omissions in the account, and they filed this bill in 1831, specifying the errors, and praying that the release might be set aside, and that the accounts might be properly taken, or that they might be at liberty to surcharge and falsify the account. It appeared that many of the partnership books and papers were not forthcoming.

It is unnecessary, for the purpose of this report, to state the specific errors complained of, except one, which related to a claim made on behalf of the residuary legatees, to have interest on *James Craig's* capital in the concern paid out of the partnership assets. The circumstances relating to which are as follow:— Upon *John Craig* being taken into partnership, the whole of the large capital employed in the business was the property of the testator, his uncle; and it was not pretended that *John Craig* had any other property to bring into the partnership except the arrears of his previous salary as clerk to his uncle. No deed of partnership appeared ever to have been executed; no stipulation as to any allowance of interest on the capital was proved; besides which, no account seemed to have been made out or settled during the partnership between the testator and his nephew, from which the terms on which they carried on their trade could be collected.

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 ~~~~~  
 MILLAR
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It appeared, that in the previous partnership of *Craig* and *Corrie*, interest had been allowed in the accounts on each partner's capital, and an interest account kept; and though nothing in this respect appeared in the partnership between the testator and his nephew, yet interest was again allowed after *Nicholls* and *Levis* had been admitted partners in the concern, but there was no allotment of the interest, as between *James* and *John Craig*. It appeared also, that in the first account prepared for passing at the legacy duty office, an item of 8161*l.* was inserted for interest on the testator's capital, which was subsequently struck out, the opinion of counsel being unfavourable to the claim. The Plaintiffs now claimed to have interest allowed on the amount of the testator's capital in the partnership concern.

Mr. *Pemberton Leigh*, Mr. *Turner*, and Mr. *Rolt* for the Plaintiffs.

Mr. *Kindersley* and Mr. *Dixon* for the principal Defendant.

Mr. *Romilly*, Mr. *Cankrien*, Mr. *Wright*, and Mr. *Toller* for other parties.

The Master of the Rolls.

In this case, the bill is filed for the purpose of setting aside a release executed on the 5th of *July 1823*, on the ground that it was fraudulently obtained, and that the accounts in respect of which it was executed, contain very numerous and important errors. Very numerous and important errors have been proved in this case. I cannot help saying that I do not recollect any case, in which errors of such an amount and number have met with so faint an answer as has been given in this case.

Errors

Errors have been distinctly proved, but it is not necessary that I should observe on them, for unless the release is to cover all the errors detected in the accounts, the accounts, in some way or other, must be reconsidered.

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CRAIG.

I quite agree with the argument that has been used, that where a release has been executed, and the parties have, for a long lapse of time, acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside, or to give leave to surcharge and falsify, but the principle must be taken with this qualification, that the nature and amount of the errors alleged and proved, may have a very considerable effect in the consideration of the question whether the release was fairly obtained.

Beyond all doubt, the Plaintiffs, who were in *Scotland*, never had an opportunity of examining those accounts. I do not find any proof whatever that the Plaintiffs relied on *William Millar* as their agent in the treaty with the other executors; on the contrary, I find that they employed their own solicitor or law agent in *Scotland*: I do not even find that *William Millar* assumed to act for them; and he himself, it must be observed, was an executor and an accounting party.

Looking at all that has taken place between these parties, what reason is there to think that the Plaintiffs had any means whatever of examining the accounts, or that they signed the release, except upon the mere confidence that these accounts had been truly and properly stated? This would entirely preclude the argument that these parties must be considered as having settled each and every disputed item, for the purpose of coming to an arrangement, agreement, or compromise. This release was signed in confidence: it was signed in the

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belief that these accounts had been truly stated, a confidence, in some degree no doubt, reposed in *William Millar*, but a confidence which, if reposed in *William Millar*, was certainly reposed without any just or proper foundation. Seeing that the release was obtained under such circumstances, in respect of accounts containing errors so great as have been proved, I cannot think that it is consistent with justice to say, that, because a considerable length of time has elapsed, before these parties, resident in a remote part of the United Kingdom, discovered the errors, the account is for that reason to stand.

I confess, therefore, that I have felt no hesitation in coming to the conclusion that the Plaintiffs must be at liberty, at the least, to surcharge and falsify the accounts. Whether they ought to be at liberty to open them altogether, is a matter of difficulty, and I must take time to consider it. I conceive it may not altogether depend upon the question of fraud or no fraud, because, having regard to the lapse of time, all parties are entitled to be treated with some consideration. Though the lapse of time will not protect them from having the account examined, still it may protect them from the necessity of proving every item contained in the account. The difficulties of taking the account, together with the loss of some of the books, which might, by possibility, contain entries which would explain the errors, might render it very fit that the Plaintiffs should merely have liberty to surcharge and falsify the account, and also that the Master should have power to state special circumstances, with the particular view of stating whether any of those books containing entries which might possibly tend to clear up those errors, have been lost.

The

The next point is as to when the partnership between *James* and *John Craig* commenced. The evidence is such that I am afraid it does not enable me satisfactorily to dispose of it. I will however consider it, and, if I cannot satisfy myself, I must direct an inquiry.

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The question of interest rests in a strange state of ambiguity; but the question is, what is to be collected from the situation in which these parties were? In the business carried on by *Corrie* and *James Craig*, it is admitted that the parties were credited with interest on the amount of their respective capitals; therefore, according to the usage of the persons then engaged in this business, an interest account was kept. In that early period of the business, it is not left to what the legal presumption or conclusion might be, in a case where persons carry on a partnership without any agreement, and without any account being kept or made out from which an agreement might be implied, for at this period, each of the persons carrying on that business was credited with interest on the amount of his capital. This continued until *March 1804*. It does not appear when *John* was admitted a partner, but the whole capital with which the partnership business was carried on after 1804, whether it was a partnership with *John* or not, was the property of *James*, and all that *John* had, was the amount of certain arrears of wages that had become due to him in the service of *Corrie* and *Craig*, and which was quite a trifle in comparison with what his uncle had embarked. Supposing *John* to have become a partner in the year 1804, the business was carried on for about ten years, without any account being stated between them. In this singular state of things, whatever property *James* had, whether it was property, plainly and avowedly in the business or exclusive of the business, all his income, and every thing that he had, seems to have been brought

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into the concern. If *John Craig's* notion was, that his uncle really intended that he *James Craig* should have had no property or income of any kind, in which he, his nephew *John*, was not to participate to the extent of one half, I confess it appears to me to have been a very singular notion to have entertained, in the absence of any legal proof, memorandum, or document of any kind from which such an intention could be collected. We are unfortunately left for ten years without the least light thrown on the subject, except that all the income which *James* was entitled to was brought into the concern, and is alleged by *John* to have been brought into the concern for the purpose of being consolidated with that capital, to a moiety of the profits of which he considered himself to be entitled.

After the 1st of *January* 1814, when *Nicholls* and *Lewis* were admitted into the partnership, we again find that there is a computation of interest commenced. The capital, treated as the capital of *James* and *John*, was credited with interest against *Nicholls* and *Lewis*, and it so went on until the death of *James Craig*. That which was the usage of *Corrie* and *James Craig* before *John* could have had any thing to do with it, became again the usage of *James* and *John Craig*, the instant they admitted any other person into the concern. But we are again under the same ambiguity as to *John* and *James*, because even then there was no account stated, as between *James* and *John*, in respect of any interest whatever. Now supposing it to be the law (which I do not think is quite so clear), that, when you find partners equally laborious and equally attentive to the business, as I think is proved they were in this case, you allow no interest on any excess of capital, and that therefore you do not put the parties on equal terms in that respect, still you would clearly give it, if you can collect, from the circumstances,

cumstances, or from the usage between these parties, that there ought to be, or was intended to be, such a computation of interest. Can one believe that the party to whom the whole capital belonged renounced his advantage in that respect, and continuing to take an equally laborious part in the transaction of the business, should bring in his whole income, both partnership and private, and yet intend to reserve no advantage of that income upon the settlement of accounts between himself and copartner? I must say, I have great difficulty in coming to such a conclusion as that. My present opinion is, that interest ought to be charged. I will look a little further to see whether there are any authorities upon it: and I will reserve that point.

With regard to the length of time that has elapsed, I feel considerable apprehension in opening these accounts altogether, from the possible loss of documents during that time, and particularly, in consequence of *John Craig* being represented by the Defendant *James Craig*, and of a great number of the partnership documents having got into the possession of Mr. *Nicholls* independent of *James Craig*. I confess that, unless bound, I should be reluctant to do it.

The MASTER of the ROLLS.

April 5.

On the best consideration I can give to this case, I think that *John Craig* must have known all the arrangements which took place in the business of *Corrie and Craig*, and the principles on which it was carried on, and the mode of computing interest on the capitals of the partners. My opinion, therefore, is, that interest ought to be computed on *James Craig's* capital. On the other point, I think that the justice of the case will be sufficiently answered by giving the Plaintiffs liberty to surcharge

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charge and falsify the account. The case may be in the paper to-morrow.

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*The Master of the Rolls.*

On consideration of this case, I retain the opinion I before expressed, that interest ought to be charged upon the capital of the partners engaged in this concern. I think, that the circumstance of *John Craig* being perfectly aware of the nature of the accounts kept as between *James Craig* and *Corrie*, and the fact that there was no agreement entered into and no act done, in any way to shew that the business between *James Craig* and *John Craig* was to be carried on on any other footing than it had been previously carried on between *James Craig* and *Corrie*, make it almost a necessary inference that an allowance of interest upon the capital must have been intended.

As to the relief which ought to be afforded, it appears to me, that under the circumstances of this case, justice will be sufficiently answered by giving the Plaintiffs leave to surcharge and falsify the accounts. Under all the circumstances, some considerable risk of undue loss to the legal personal representative of *John Craig* might be incurred, if the accounts were altogether opened.

The decree I propose to make is this: — Declare that the Indenture of release of the 15th of *July 1823*, shall stand only as a discharge for the several sums of money thereby stated to be retained by, or paid to, the several parties thereto as therein mentioned. Declare that the account in the indenture mentioned to be stated shall stand, with liberty to the Plaintiffs and the Defendant, the legal personal representative of *John Craig*, to surcharge and falsify the same. Direct the Master to ascertain

certain and state, what, at the date of the indenture, was the just amount and value of the residuary estate of *James Craig* deceased. Direct an inquiry at what time *John Craig* deceased was admitted to be, and became, a partner with *James Craig*, in the business in the pleadings mentioned. Direct that, so far as it may be necessary for the purpose stated, the Master is to take an account of the dealings and transactions of the partnership subsisting between *John Craig* deceased and *James Craig* deceased, from the commencement thereof to the time when *Charles Nicholls* and *William Lewis* were admitted partners in the said business, and also of the dealings and transactions of the partnership subsisting at the decease of *James Craig*, and at the decease of *John Craig*, between *Charles Nicholls* and *William Lewis*, from the commencement thereof up to the time of the death of *James Craig*. Let the Master ascertain and state what was due to *James Craig* deceased, from the said partnership firms, or either of them, at the time of his death; and, in taking those accounts, interest is to be allowed to each partner for the amount of his capital, from time to time, employed in the concern. Let the Master also, so far as it may be necessary for the purpose aforesaid, take an account of the personal estate and effects of *James Craig* deceased, possessed by *John Craig* deceased, *William Millar* and *Charles Nicholls*, or any or either of them, the Plaintiffs waiving all relief against *Ann Craig*, the estate of *John Craig* deceased, and *William Millar* and *Charles Nicholls*, in respect of any acts and receipts of *Ann Craig* on account of the estate of *James Craig*. Let the parties produce before the Master all books, documents, &c. in the usual way, and if, in the proceeding to surcharge and falsify the accounts mentioned in the indenture of release, or, in taking any of the accounts hereby directed, it shall appear, that any books, documents, or writings necessary

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or useful as evidence in respect of the matters aforesaid, or any of them, are wanting, let the Master report the same specially (a), and also state, whether, in consequence of the want of any such books or documents, he is unable to proceed satisfactorily in taking the accounts, or in making the enquiries hereby directed.

Reserve all the costs.

(a) See *Turner v. Corney*, 5 *Beavan*, 515.

April 26, 27,  
 28.

The ATTORNEY-GENERAL v. RICKARDS.

Exceptions  
 for imperti-  
 nence cannot  
 be maintained,  
 if the ma-  
 teriality of the  
 passages is  
 so connected  
 with the  
 merits of the  
 cause as to  
 render it pro-  
 per matter for  
 discussion  
 and for the  
 determination  
 of the Court  
 at the hearing.

An informa-  
 tion was filed  
 by the  
 Attorney-  
 General at  
 the relation of  
 A. B., to set  
 aside a frau-  
 dulent deed  
 executed by  
 an outlaw in  
 a civil action,  
 between the  
 judgment and  
 inquisition.

Held, that  
 statements

shewing the interest of the relators and the motives for the execution of the deeds,  
 as against the creditors, were not impertinent.

THE question in this case was, whether certain pas-  
 sages in the information were or were not imperti-  
 nent.

The information was filed by the Attorney-General,  
 at the relation of three persons named *Engler*, *Stulz*,  
 and *Housley*, and the substance of the statements was  
 this: — Mr. *Annesley* was indebted to *Engler*, who pro-  
 ceeded against him to outlawry. Judgment of out-  
 lawry having been entered up against *Annesley* in 1835,  
 the sheriff held an inquisition under a *capias utlagatum*,  
 and, on the 11th of January 1841, returned, that *A.* was  
 not seised of any lands within his county. The informa-  
 tion alleged, that such return had been made, in con-  
 sequence of a fraudulent deed executed by *Annesley*,  
 whereby his freehold property had been conveyed to  
*Rickards* and *Walker*, his attorneys. The information  
 insisted that this deed was voluntary and fraudulent,  
 and that it had been executed between the return to a  
 former writ, which turned out to be defective, and the  
 return to the present writ.

The

The information prayed, that her Majesty's Attorney-General, on behalf of her Majesty, might have the benefit, in equity, of the said judgment of outlawry and of the said writ of *capias utlagatum* issued thereon; that the said indenture or deed of trust might be declared fraudulent and void, and of none effect, as against the right or title of her Majesty under and by virtue of the said outlawry; that all the estate and interest which belonged to the Defendant *Annesley* in the lands and hereditaments comprised in the said indenture, or, (in case the said indenture should be to any extent valid or effectual) then such estate as still belonged to him beneficially, in or out of the same lands and hereditaments, might be answered to her Majesty, and for an injunction and receiver.

The information contained the following passages, which, it was contended, were impertinent:—

“ That, by indenture of assignment, bearing date the 19th day of *August* 1833, the said *Frederick Engler*, for good and valuable consideration, duly assigned the said bond and all principal monies and interest due or to become due thereon, unto *Stulz* and *Housley*, the two other relators herein named,” &c., “ and thenceforth the debt remained “ in trust as to the beneficial interest therein for the said *Stulz* and *Housley*.”

“ That the said indenture was devised and contrived fraudulently, for the purpose and intent to delay, hinder, or defraud the creditors of the Defendant, *A. Annesley*, of their just and lawful actions, suits, debts, and demands, and in particular to delay and defeat the debt of the said *Frederick Engler*, and his proceedings, in or under the said outlawry.”

“ That

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“That, at and before the time of executing the said indenture, the said Defendant *A. Annesley* was residing at *Holyrood House*, for the purpose of avoiding his creditors, or of preventing or delaying the proceedings against him, and he was in very embarrassed circumstances, and indebted in very large sums of money, which he was wholly unable to pay.”

These and the corresponding interrogatories and some other minor passages were objected to as impertinent, and the Master, upon exceptions, so found them. The Plaintiff thereupon brought the case before the Court upon exceptions to the Master’s report.

Mr. *Pemberton Leigh* and Mr. *Campbell*, for the Plaintiff, in support of the exceptions to the Master’s report. These statements are not impertinent. “Impertinencies are where the records of the Court are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question: as where a man will tell a tale of a tub, where he sets forth a long deed, which is not prayed to be set forth, *in hac verba*, where he stuffs his answer with long recitals, which are nothing to the purpose.” (a)

Here it was necessary and proper to shew why these persons were made relators, and their real interest in the matter, and why, in substance, they proceed in the name of the Attorney-General. The deed is alleged to have been executed for the purpose of defrauding the creditors. The fraud, as against the Crown, flows from the fraud against the creditors, and, to shew that fraud, it is most important to state the objects and motives of the

(a) *Gilbert, For. Rom.* 209.

the parties. Though the forfeiture on an outlawry is nominally to the King, yet, in truth, it enures to the Plaintiff in the action, and the produce goes towards payment of his demand. If the debt and costs were paid, the outlawry would be reversed. The Crown, therefore, in substance, stands in the nature of a trustee for the creditors. (a)

If these passages were really impertinent, they are too trifling to make it reasonable to incur the expense of expunging them; the only object of the Defendant in getting these exceptions allowed is to enable him to demur to the information, long after the time for demurring has expired. If there be the slightest doubt of these passages being found material at the hearing, the Court would not now expunge them; it would be deciding the merits of a case upon exceptions for impertinence, — a course so manifestly inconvenient that the Court would hesitate to adopt it.

**Mr. Kindersley** and **Mr. Kenyon**, for the Defendants. The statements contained in this information relative to the assignment of the debt by *Engler*, to the fraud alleged to have been practised on the creditors of *Annesley*, and to his residence at *Holyrood House*, and his object in so doing, are wholly irrelevant to the issue, and to the case of the Crown; they are therefore impertinent.

The Attorney-General might, in a case of this description, have sued without any relator; *Engler*, *Stulz*, and *Housley* are not parties to this information, and it is therefore perfectly immaterial what claims they may

(a) See *Rex v. Wilkes*, 4 *Burr.* 2549.

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may have against *Annesley*. At law they have no recognised interest under the outlawry, the Crown alone would be entitled to any property seized under the *capias utlagatum*; *Rex v. Fowler*. (a) It is true that the Crown usually makes a grant of the property to the creditor; but this is an act of mere grace and favour; and the practice does not, until the grant has been made, confer on the creditor any acknowledged right or interest in law, to the outlaw's property. The case is similar to that of a bastard dying intestate, and without heirs, though the Crown, in such a case, usually grants the escheated property to the family, still they have no interest which would enable them to maintain any proceedings in respect of the bastard's property. "The Crown is not and cannot be a trustee for the creditors. It is merely matter of grace that the King makes such grant of the goods of persons outlawed to the Plaintiffs, who have no manner of right in the goods until the grant has been obtained from the Crown." — v. *Bromley*. (b)

The *capias utlagatum* has relation to the lands of which the outlaw was seized on the day he was outlawed, or at any time since (c); the alleged deed was subsequent.

*The MASTER of the ROLLS.*

This is an information filed for relief, which is certainly of a singular description, and may require great consideration before the cause is ultimately disposed of.

It —

(a) *Bunb.* 38.

(c) See *Lilly's Entries*, 465.—

(b) *2 P. Williams*, 269.; and see 552.

*Cudden v. Hubert*, 7 *Simp.* 485.

**It** contains some few allegations, which are not alleged to be tainted with any prolixity or unnecessary length, with regard to the matter intended to be expressed, but which are said to express matters wholly immaterial, and which, therefore, ought to be treated as impertinent. The matter complained of, independent of the interrogatories, contains twenty lines in the stating and charging part. I am not at all prepared to say that, matter of this length introduced into pleadings might not be so plainly irrelevant, and so unlikely to afford any foundation for the relief prayed, as to make it proper to apply to the Court to expunge it as impertinent. But consider the questions which constantly arise at the hearing, as to the materiality or immateriality of an allegation. Those who are accustomed to attend Courts, hear, from day to day, arguments alleged at the Bar by counsel on the one side, that a particular allegation is important, and by the other side that it is not; and the Courts, in their judgments, and upon the result of a careful examination, reject, I think I may say without exaggeration, four fifths of what is alleged to be material, and found their judgments on the remaining fifth. Those who are acquainted with this course of proceeding, and with the real difficulty there often is in ascertaining whether an allegation is material or not, would not, in the least degree be disposed to concur in the opinion, that because a fact may, at the hearing or at the end of a cause, turn out to be immaterial, it is therefore to be treated as impertinent from the beginning.

I think that these exceptions to the Master's report ought to be allowed, and for this reason, that it will be matter of argument upon the merits of the cause, at the hearing, whether these passages are or are not material.

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The Court cannot go into all the merits of a case and consider what the ultimate rights of a Plaintiff may be, for the purpose of determining, and that upon an imperfect argument, whether certain allegations, the materiality of which may be doubtful, are actually to be considered as immaterial. It would have the effect of drawing the whole merits of a cause into question, upon an allegation of impertinence. This would certainly be an inconvenient mode of proceeding, and one not, in the least degree, calculated to preserve any right which the party who takes the objection has in the cause; for if it should appear, upon the consideration of the case on the merits, that the allegations complained of are immaterial, they cannot, in any degree, support the equity of the case, or give the Plaintiff any right as against the Defendant.

It is a matter of importance to avoid unnecessary length; but it is of much more importance, in discussing a question of length or materiality, not to determine the merits, before the Court has before it all that is material to the merits. It is for this reason that I think these exceptions had much better never have been filed; and for this reason also I think the Master has come to an erroneous conclusion; the exceptions to his report must therefore be allowed.

I wish to observe I have not at all determined whether these passages are material or not. If this matter had come on upon the merits, it would then have been necessary to consider whether these allegations were material, and whether they did or did not tend to support the equity raised by the information. I think that exceptions for impertinence, in respect of matters alleged to be immaterial, cannot be maintained, when the question

tion of the materiality is so connected with the merits of the cause, that it cannot be decided without going into the consideration of the whole merits of the cause.

**Note.**—Affirmed on other grounds by the Lord Chancellor,  
<sup>1</sup> *Phillips*, 383.

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May 9.

THE bill, in substance, alleged, that the Plaintiff had been induced by two solicitors who were in partnership, to consent to be appointed a new trustee of the will of *Walter Woodcock*, in the room of a deceased trustee. That he had been so appointed upon their undertaking to indemnify him, and that the solicitors afterwards acted, on the Plaintiff's behalf, in the trust. The bill sought to make the estates of both liable for the receipt of trust monies.

The Defendants, by their answer, objected that the suit was defective for want of parties, and amongst other persons, they insisted that the personal representative of *Woodcock* was a necessary party. The Plaintiff, under the 39th Order of *August 1841 (a)*, set down the cause for argument upon the objection that the personal representative of *Woodcock* was a necessary party, and he submitted to the other objections.

Mr. *Pemberton Leigh*, for the Plaintiff, insisted on his right to begin, he alone having the right to set down the objection.

Where a cause is set down upon an objection for want of parties, the Plaintiff begins.

Where a cause is set down upon an objection for want of parties under the 39th general Order of *August 1841*, the Court merely gives its opinion on the record as it then stands. The objection can only be finally disposed of at the hearing, when the record and evidence are complete.

Form of order in such case. Costs reserved.

Mr.

(a) *Ordines Can. 175.*

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Mr. *Turner* for the Defendants. The objection being raised by the Defendants, they have a right to begin, in the same way as upon a plea or demurrer for want of parties. At the hearing, though the Plaintiff opens his case, the Defendant has the reply on an objection for want of parties.

*The Master of the Rolls* decided that the Plaintiff was entitled to begin.

The objection for want of parties was then argued.

Mr. *Pemberton Leigh* and Mr. *Bevir*, for the Plaintiff.

Mr. *Turner*, *contra*.

Mr. *Pemberton Leigh*, in reply.

*Beasley v. Kenyon* (*a*), *Seddon v. Connell* (*b*), *Slater v. Wheeler* (*c*), *May v. Selby* (*d*) were cited.

*The Master of the Rolls* decided that the objection was not tenable, and during the discussion said:— Where a Plaintiff declines to set down for argument, an objection for want of parties raised by the answer, he subjects himself to this penalty: — he will not at the hearing, be entitled, as of course, to an order to amend by adding parties. He would still, however, be at liberty to make out a special case for the exercise of the discretion of the Court in his favour, and the Court would then have to decide whether his bill should be dismissed

(*a*) 3 *Beav.* 544.

(*b*) 10 *Simons*, 79.

(*c*) 9 *Simons*, 156.

(*d*) 1 *Y. & C. (C. C.)* 255.

missed, for want of parties, or retained with liberty to amend.

When a cause comes before the Court under the 39th Order, the Court can only give its opinion on the record as it then stands; the objection cannot finally be disposed of until the hearing, for it is impossible at the beginning of a cause to say who will be necessary parties at the end. The Court cannot finally determine the matter until the record has been completed and the evidence taken. Whatever the Court might decide on such an occasion, the Plaintiff might the very next day amend his bill and vary his case, and the suit might again undergo a variation by the further answer and evidence. The judgment of the Court on such an occasion cannot therefore be conclusive.

As to the form of the order, I think there ought to be some *constat* of what has been decided by the Court. The proper form of order would seem to be this:— the Defendants having by their answer objected that certain persons (naming them) are necessary parties to this suit, the Plaintiff caused the objection to be set down, and demanded the opinion of the Court, whether the personal representative of *Woodcock* was a necessary party to the suit. Whereupon &c., the Court held, that as the record was now framed, such personal representative was not a necessary party.

The costs should be reserved until the hearing.

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BRADSTOCK  
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See (1848) 12 M. & S. 11.

1843.

June 6.

## The ATTORNEY-GENERAL v. Lord CARRINGTON.

An information related to two objects, one failed, and the decree dismissed so much of the information as related to it, without costs, and ordered the Defendant to pay the informant his costs of the suit. Held, that the Taxing Master was wrong in apportioning the general costs of suit between the two objects.

The Court will not interfere with the discretion of the taxing masters as to the *quantum* of fees to counsel.

Costs of process of contempt for not answering, not allowed in the taxation of costs of suit as between party and party.

By the decree the lands of the Defendant were declared chargeable with 40*l.* a year, and the Master was directed to take an account of the arrears, and the Defendant was ordered to pay what should be found due. Held, that the Defendant was not, under the 1 & 2 Vict. c. 110. ss. 17, 18., liable to pay interest on the amount found due, from the date of the decree to the date of the Master's report.

THIS case came before the Court upon petition, partly impugning the correctness of the Master's taxation of costs.

The information was filed, seeking to charge the estates of Lord *Carrington* with two perpetual annuities of 40*l.* and 4*l.* At the hearing, the relief in respect to the latter was abandoned, and by the decree it was ordered, that so much of the information as sought to charge the lands with the payment of the annuity of 4*l.* should be dismissed *without costs*. And it was declared that the said lands were chargeable with the annuity of 40*l.* per annum, and an account of the arrears was directed, and it was ordered that the Defendant Lord *Carrington* should pay into the Bank what should be found to be the amount of the arrears, and it was ordered, that the said Defendant should pay to the informant his costs of the suit, and also pay to the other Defendants their costs of the suit, the said costs to be taxed by the taxing Master.

The Attorney-General took in his bill of costs for taxation, which amounted to 333*l.* The taxing Master taxed it at 101*l.*, having struck off several items, and having disallowed 79*l.* by way of apportionment of the general costs of the suit common to the two annuities of 4*l.* and 40*l.*

What

What took place on the taxation as to this latter item, will be best explained by the following extract from the Taxing Master's note.

“On the taxation of the bill of costs of the informant, it was insisted before me, on the part of the Defendant Lord *Carrington*, that inasmuch as the information had been filed to establish two distinct annuities, and as the informant had failed as to one of the two objects sought to be attained by his suit, there must be an apportionment of the pleadings, and also of the general costs of the suit applicable thereto, and that the informant could only be allowed for such part of the pleadings as sought to charge Lord *Carrington's* estate with the 4*l.* annuity, and also of a proportionate part of the general costs.

“On the other hand, it was insisted, on the part of the informant, that inasmuch as the costs occasioned by the unsuccessful attempt to charge the Defendant Lord *Carrington's* lands with the payment of the annuity of 4*l.*, had not at all increased the length of the pleadings, (the whole of such pleadings, with the exception of a very few words, being quite as much applicable to the annuity of 40*l.* singly, as to the two annuities together); moreover, that as the decree, after directing the dismissal as to the charge of the 4*l.* annuity without costs, had gone on to direct the Defendant Lord *Carrington* to pay the informant's costs of the suit, it must be understood to have given the latter the whole of the costs of the suit, without any apportionment in respect of the unsuccessful part of it.”

“The terms adopted by the parties in the drawing up of this decree, are not, as it seems to me, precisely in accordance with the view contended for either on the

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 CHAMBERLAIN

one side or on the other; and, accordingly, the intention of the Court with regard to the informant's costs, is by no means so clear as it might have been made. On the whole, however, it appeared to me, that the best construction to put upon this decree was, that it was not the intention of the Court to make this case an exception to the general rule, which precludes a party entitled to the costs of a suit generally, from having allowed to him the costs of that portion of the proceedings therein in which he has failed, but simply to direct that the informant should have such costs as he is entitled to by the course and practice of the Court; I accordingly decided on disallowing a proportionate part of the pleadings, and also of the general costs relating to the 4*l.* annuity on which the informant had failed, according to the decision in *Heighington v. Grant*. (a) I allowed the informant to have the costs of the

“With regard to the mode of such apportionment, I found, on a perusal of the pleadings, that it had been correctly stated to me on the part of the informant, that the information and answers related quite as much to the annuity of 4*l.* as to that of 40*l.*; and, consequently, there seemed to me to be no other course to be adopted, but that of allowing the informant one half only of such pleadings and of the general costs applicable thereto, down to the decree; thus ascribing the other half of such pleadings and general costs down to the decree, to the part of the suit on which the informant had failed, (See the case of *Heighington v. Grant* before referred to). The remainder of the costs subsequent to the decree I allowed in full.”

This petition stated, that as to the claim in the information for the said annuity of 4*l.*, the information

was

(a) 1 *Beavan*, 228.

was increased in length by reason thereof one hundred and twenty words, or one folio and thirty words, and no more, and the length of the Defendant's answer was increased, by reason of such claim, to seven folios and twenty-two words, and no more. (1 *Beavan*, 228.)

Mr. *Pemberton Leigh* and Mr. *Blunt*, in support of the petition. Although the Court has dismissed without costs so much of the information as related to the £1, still it subsequently directs the Defendant to pay the whole costs of suit. The length of the proceedings was scarcely, if at all, increased by the claim in respect of the £1 annuity; the intention of the Court was merely to relieve the Defendant from the costs of that small portion of the pleadings which related to the £1 annuity, and certainly not to release him from a half of the general costs of the suit which has succeeded. (1 *Beavan*, 228.)

(*Mr. Turner* and *Mr. Greene*, *contra*). The Master has proceeded according to the usual mode, in ascertaining the proportion of the costs attributable to the second object of the information; *Heighington v. Grant*, (a). It is difficult to conceive how this can be done. If so much of the suit as related to the £1 annuity had been dismissed with costs, it is clear that the informant would then have been properly charged with the 79*l.*; the effect of dismissing it without costs, is merely to relieve him from the payment of that sum. To give it him will be to dismiss a portion of the information, and yet make the successful Defendant pay the costs of it.

It is said that the addition occasioned by the claim is small, but the same would have been said if the informant had succeeded as to the £1, and failed in the

1849.  
The  
ATTORNEY  
GENERAL  
vs.  
Lord  
GERRINGTON

1843.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 Lord  
 CARRINGTON.

407. In reality, the whole information relates as much to one as to the other. Ought a Defendant who attempts to support his suit by two independent claims, to have the whole general costs if he succeeds in one, though he entirely fails in the other?

*The Master of the Rolls.*

I think it clear that the Master has mistaken the effect of this decree.

Where various matters are comprised in a suit in equity, it is by no means an uncommon occurrence, that the Plaintiff may so succeed, as to entitle him to a decree with costs as to one of the objects of his suit, and yet may entirely fail in another object, and as to that, have his bill dismissed with costs.

The ordinary practice of the Court, when a Plaintiff obtains a decree with costs as to part, and has his bill dismissed with costs as to another part, is to direct an apportionment to be made of the costs, and that the costs of one part shall be set off against the costs of the other part. In order to obtain that end, an apportionment must necessarily be made of the pleadings, and of the different proceedings that have, from time to time, taken place. Whether that is effected in the best manner, according to the practice of the Court, is more than I will undertake to determine, for I confess there were things in the certificate in *Heighington v. Grant* which a little surprised me at the time I acted on it. The rule seemed to be this, that if matters relate exclusively to one object, then, in the apportionment, the costs relating to them were apportioned to that object alone; but if such matters were common to both objects, then the costs would be equally divided between them.

The

The state of things may be this:—a decree may be made with costs as to part, and the bill may be dismissed with costs as to the other part, if there appears to have been considerable costs incurred with respect to that part of the demand which has failed; on the other hand, a different order would be made, if it appeared quite manifest, that the costs incurred upon that part which has succeeded have not been at all, or scarcely at all increased, by that part which has failed. This is peculiarly so in this very case. A great quantity of pleadings and different documents had been stated relating to the first object, and a few words were put in making a claim which failed. It is not alleged, that the costs of this suit have been sensibly increased by that claim. The contrary, appears by the certificate which the Master has, with great propriety, made in this case, and all parties have agreed in that fact. The matter being considered at the hearing of this case, and it being clear there ought not to be an apportionment as to the matter that related to the object which failed (it being so trifling as to be of no consequence at all), the information was dismissed without costs as to that. It is supposed that this is no exception to the general rule. The information was dismissed without, and not with costs, as to part, and a decree was made with the costs of the suit. Now the Master is said to have conceived, in his construction of the decree, that it was not the intention of the Court to make this case an exception to the general rule. In that particular I think the Master was mistaken. The case was an exception to the general rule. The taxation was not to be according to the general rule, but according to the particular direction given at the hearing. That being so, I think the report ought to be reviewed by the Master.

1843.  
The  
ATTORNEY-  
GENERAL  
v.  
Lord  
CARRINGTON.

1842.  
 The  
 ATTORNEY-  
 GENERAL  
 &  
 Lord  
 CARRINGTON.

Some other points arose in this case, but of harmonic  
 interest, and of much less difficulty, it will suffice to say  
 that the fees paid to the Attorney-General and two coun-  
 sel with him amounted to 89*l.* 4*s.*, of which the Master  
 taxed off 15*l.* 15*s.* The petitioner insisted, that having  
 regard to the time devoted to the case, the cause having  
 occupied two days, the fees paid were reasonable and  
 proper; and that the whole ought to have been al-  
 lowed.

It was said that the fees were reasonable and proper  
 and *The Master of the Rolls* said, "I will not say so,  
 but this is a mere question of *quantum*, I cannot deal  
 with it." (Report of the Court of Common Pleas, 1842, vol. 11, p. 111.)

It was said that the fees were reasonable and proper  
 and *The Master had disallowed two items of 15*l.* 15*s.* which were costs incurred in issuing process of con-  
 tempt against two Defendants who had not answered  
 within the limited time, but which had not been executed.*  
 The petitioner sought to have these sums allowed.

It was said that it was contrary to practice to allow  
 these costs, unless specially directed by the order of tax-  
 ation.

*The Master of the Rolls.*

There is a rule that you cannot get the costs, unless  
 they are specially applied for. (a) The Master is right.

By the decree, dated the 13th of December 1842,  
 the lands of the Defendant were declared chargeable  
 with an annuity of 40*l.* a year, and the Master was  
 directed

(a) *1 Smith's Pr.* (3d ed.) 208

directed to take an account of the arrears of the annuity of 40*l.*; and it was ordered, that what the Master should find to be the amount of such arrears should be paid by the Defendant into the Bank. of Birmingham; and it was so agreed and done on the 1<sup>st</sup> of April, 1848. The following is the Master's report, made in April 1848, found 91*7*½** to be due, which was immediately paid into the Bank, of Birmingham, with their bill of exchange, as follows:

The Attorney-General now contended, that, under the 1 & 2 Vict. c. 110. ss. 17, 18, the Defendant was liable to pay interest at 4 per cent. on this sum, from the date of the decree to the date of the Master's report.

On the other hand, it was contended, that there was no decree whereby any sum of money was payable, at least until the amount had been ascertained by the Master, and to order interest to be paid would be to vary the decree. It is liable to, and will be fully satisfied by the payment of the amount of money now due.

The Master of the Rolls was of opinion that the Defendant was not chargeable with interest during this period.

1848.  
The  
ATTORNEY-  
GENERAL  
vs.  
Lord  
Exminster.

## MASTER OF THE ROLLS.

It is agreed that the sum of £91*7*½** is due to the Plaintiff, and that he is not bound to pay the same.

It is agreed that the sum of £91*7*½** is due to the Plaintiff, and that he is not bound to pay the same.

1849.

June 9.

## STURGE v. DIMSDALE.

A simple declaration that charity legacies are to be paid out of pure personality, will not give to such legacies a priority upon the pure personality over other legacies and charges; nor exempt any part of the estate, from the ordinary rules of applying and distributing the assets.

A testatrix created a mixed fund of realty and personality for payment of her debts and legacies, but she directed the charity legacies to be paid out of pure personality. She afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of

annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. *Semble*, that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty, in the proportion of the realty to the personality, but held, that the second part created a demonstrative fund of pure personality, out of which the charity legacies were to be paid.

THE testatrix *Ann Dimsdale* devised her freehold, copyholds, and leaseholds to trustees, upon trust to sell, and stand possessed of the produce and of her personal estate, upon trust, in the first place, to pay her debts and funeral and testamentary expenses, and then to pay the several legacies and annuities thereinafter bequeathed, so far as the same would extend, and she then proceeded as follows:—“Provided nevertheless, and my will is, that none of the legacies hereinafter bequeathed to charitable societies or institutions, or for charitable purposes, shall be paid out of the monies to arise by the sale of my estates, messuages, lands, tenements, and hereditaments, or any of them, but *shall be paid*, so far as the same shall or may become payable under and by virtue of the directions hereinafter contained, exclusively *out of and from such part of my personal estate only, as is legally applicable thereto.*”

The testatrix then gave a number of annuities to individuals; and, for the purpose of providing a permanent fund for payment of the annuities, she directed her trustees to retain so much of the capital stock in the three per centum consolidated bank annuities which she might have at the time of her decease, if she should have sufficient for the purpose, and if not, then to purchase with other part of her personal estate so much more of the said capital stock as, with the capital she should

annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. *Semble*, that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty, in the proportion of the realty to the personality, but held, that the second part created a demonstrative fund of pure personality, out of which the charity legacies were to be paid.

should have therein, should produce such annual interest and dividends as should be equal to the aggregate annual amount of the annuities which she had thereinbefore given.

1843.

 STURGE

v.

DIMSDALE.

She then gave a number of pecuniary legacies, and also a charitable legacy of 500*l.* "to be paid out of her personal estate only," and twelve legacies of 500*l.* to individuals. And in case her real and personal estate, after payment of her debts, funeral, testamentary and other expenses, and after making such investments in the three per centum consolidated bank annuities, as she had directed, and payment of all the legacies and sums of money thereinbefore given (except the said last-mentioned twelve legacies of 500*l.*), should prove insufficient to pay the said twelve last mentioned legacies of 500*l.* each, then the deficiency was to be paid in manner hereinafter mentioned. And she declared, that her trustees should stand possessed of the said sum of capital stock in the three per cent. consols, subject to the charges thereon, under and by virtue of that her will expressed, upon trust, as the said annuitants died, to sell out sufficient capital stock, to pay off so much of the twelve legacies as there should remain unpaid. And after full payment of all the legacies, annuities, and charges thereinbefore given, she bequeathed unto the British and Foreign Bible Society, and the Moravian Missionary Society the sum of 1000*l.* each, and to the *Bristol* Infirmary, the *Bristol* Strangers' Friend Society, the *Bristol* Refuge Society, the *Bristol* Lying-in Society, the *Bristol* Guardian Society or House, the *Bristol* Misericordia Society, the *Bristol* Dorcas Society, and the Prison Discipline Society, the sum of 500*l.* each, payable in manner hereinafter mentioned without any interest.

And

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And as the annuitants died, she directed the trustees to sell such part of the said capital stock as they should think fit, and to pay the produce thereof rateably and in proportion to and amongst the said ten charitable societies or institutions, until the whole of the said legacies should be paid. And she gave any surplus of the said capital stock and residuary estate unto the said ten societies in proportion to their several legacies.

The value of the real estate of the testatrix amounted in round numbers to about 22,000*l.*: her personal estate consisted of about 46,000*l.* consols, and 11,000*l.* reduced, and a sum in cash.

By an order of the court a sum of 28,081*l.* consols had been set apart to answer the annuities. The cause now came on for further directions.

Mr. *Pemberton Leigh* and Mr. *Piggott* for the Plaintiffs, the executors.

Mr. *Spence*, Mr. *Wood*, Mr. *Kindersley*, Mr. *Kenyon*, Mr. *Parker*, and Mr. *Goodeve* for the charity legatees, contended that they were payable in full out of the personal estate, or at least out of the 28,081*l.* which was a specific fund directed (subject to the rights of the annuitants) to be applied in payment of the charitable bequests.

Mr. *Milne*, Mr. *Hellyer*, and Mr. *Rolt* for other parties.

Mr. *Turner* and Mr. *Craig* for Baron *Dimsdale*, the heir-at-law. The direction that the charity legacies shall be paid out of the personal estate legally applicable thereto, is not of itself sufficient to give to the charity legacies a priority upon the pure personality over the other

other legacies and charges. *The Philanthropic Society v. Kemp.* (a) There must, therefore, be an apportionment of the legacies between the real and personal estate, and the charity legacies will fall in the proportion of the realty to the personalty. The produce of the real estate thus devised will belong to the heir-at-law; *Roberts v. Walker* (b) and *The Attorney General v. Southgate* (c) were cited.

1843.
Stukeley
BASDALE.

The Master of the Rolls. (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z)

It appears to me that the effect of the first words of this will is, to create a common fund composed of realty and personalty, which would consequently be liable to the ordinary rules of apportionment between the parties entitled to the fund, who stand in different characters; but there follows a direction that the charity legacies are not to be paid out of the real estate, but are to be paid, "exclusively, out of and from such part of her personal estate only as might be legally applicable thereto." I do not feel disposed to alter the opinion which I am reported to have expressed on a former occasion. (a) Certainly I very much doubt whether words of this kind will be sufficient to exempt any part of the estate from the ordinary rules of applying and distributing assets. The words here do not contain any direction that the charities shall, in the distribution of the assets, have any priority over any other demands upon the general assets. If therefore it rested upon these words alone, I should have hesitated a great deal before I could give full effect to these charity legacies, but what occurs afterwards in the will seems to me to be most material.

The
(a) 4 *Beaven*, 581. (c) 12 *Simp.* 77.
(b) 1 *W.R.*, 8. *M. 752.* (d) 1 *W.R.*, 8. *M. 752.*
1946. VI. *I i*

1843.

STURGE
v.
DIMSDALE.

The testatrix was very anxious to have various annuities paid in full, and she directed that a sufficient amount of stock should be set apart for answering them; having created a fund for the payment of these annuities, she directed that if the other parts of her estate should not be sufficient for the payment of the twelve legacies of 500*l.* each, then that the fund set apart for the payment of the annuities should be made answerable for any deficiency that might occur. When the annuitants die, and it becomes clear that a portion of the corpus of the fund provided for their payment can be safely applied, she directs the trustees to sell the released portion and apply the proceeds, first in payment of the twelve legacies of 500*l.* each, and then among the persons entitled to the charity legacies.

But for this direction, I own I should have had great difficulty, but with it I feel none. There is a fund constituted, or, according to the term which is used on occasions of this sort, a fund "demonstrated" by the testatrix herself, for the payment of those charity legacies. If it were perfectly clear that the whole of that fund of 28,081*l.* consisted of pure personality, I think there would have been nothing more to be said about the matter; for it appears to me, that the charity legatees are entitled to be paid, by means of the specific fund over which the testatrix has directed them to be paid, and which was to consist of pure personality.

I should not have felt clear on it if the question depended on the first clause alone; for I doubt whether a mere declaration that charity legacies are to be paid out of pure personality will give them a priority over the other legacies and charges.

1843.

LLOYD v. CLARK.

June 15.

THE bill in this cause was originally filed against *Clark*. The common injunction was obtained, for want of answer, and *Clark's* answer having afterwards been filed, was found insufficient; whereupon,

On the 16th of *June 1842*, the Plaintiff obtained a common order to amend without prejudice to the injunction, and that *Clark* should answer the exceptions and amendments at the same time.

The Plaintiff by amendment made *Argent* a party.

On the 23d of *February 1843*, *Clark* put in a sufficient answer. *Argent*, the only other Defendant, having then already put in a sufficient answer, the injunction was continued as against *Clark* (a) on merits confessed.

On the 31st of *May 1843*, the Plaintiff obtained an order of course to amend without prejudice to the injunction, undertaking to amend within one week. The question was whether this order of the 31st of *May* was regular, that is, whether it had been obtained in time.

By the 13th amended Order of *April 1828* (b), a Plaintiff must obtain an order to amend within six weeks after the last answer is to be deemed sufficient.

By the 4th Order of *April 1828* (c), an original answer is to be deemed sufficient, if exceptions are not taken within *two months* from the filing.

The

(a) *Ante*, page 309.(c) *Ord. Can. 6.*(b) *Ord. Can. 8.*

I i 2

A Defendant put in an insufficient answer; the Plaintiff obtained an order to amend, and that the Defendant might answer the exceptions and amendments together. Held, that the Defendant's answer to the amended bill was to be deemed sufficient at the end of two months, under the 4th Order of *April 1828*, and not at the end of three weeks under the 6th amended Order of *April 1828*.

The 6th Order of *April 1828* does not apply to a case, where a Defendant is ordered to answer amendments and exceptions together.

1843.

LLOYD
v.
CLARK.

The 6th Order of *April 1828 (a)*, directs that if the Plaintiff do not, within *three weeks* after a Defendant's second or third answer is filed, refer the same for insufficiency on the old exceptions, such answer shall thenceforth be deemed sufficient.

If, therefore, *Clark's* second answer was to be deemed sufficient at the end of three weeks (16th *March*), the order to amend (31st *May*) had not been obtained within the six weeks. If, on the other hand, the answer was to be deemed sufficient at the end of two months (20th *April*), the six weeks expired on the 1st of *June*, and the order to amend, obtained on the 31st of *May*, was therefore regular.

The Defendant, on the 5th of *June 1843*, gave notice of motion to discharge the order to amend of the 31st of *May* for irregularity, which motion was now brought on.

Mr. Kindersley, in support of the motion.

Mr. Pemberton Leigh and *Mr. Bates, contra.*

The MASTER of the ROLLS.

The answer of *Clark*, to the amendments and to the exceptions, was filed on the 23d of *February 1843*, and the title of that answer was, I presume, in the ordinary course, the further answer to the original bill and the answer to the amended bill; and the question is, whether an answer so entitled, comes within the description of the 6th Order of 1831, by which, "if the Plaintiff do not, within three weeks after a Defendant's second or third answer is filed, refer the same for insufficiency on the

(a) *Ord. Can. 6.*

the old exceptions, such answers shall thenceforth be deemed sufficient." This was not a second answer to the original bill, but an answer to the amendments conjoined with the unanswered portion of the original bill. Is it not the first answer, so far as regards the amended bill?

1843.
LLOYD
v.
CLARK.

It is quite clear that the 6th Order contemplates an answer to the same bill, namely, the second and third answer to the original bill; but if you have an answer which cannot be called the second or third answer to the same bill, but to that bill conjoined with amendments, then the case does not fall under the provisions of this order.

If such an amended bill were within the 6th Order, then, however insufficient the first answer might be, however important the matters of amendment might be, and however long it might require to investigate the sufficiency of the second answer, yet such answer would be deemed sufficient at the end of three weeks, instead of two months, and the Plaintiff's time for amending would consequently be reduced by five weeks. I must refuse this motion without costs.

1843.

June 23.

THOMPSON *v.* BLACKSTONE.

A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase money, retain a private debt due to him from the trustee. On a bill by the trustee: Held, that this Court would not decree the specific performance of such a contract.

THIS was a bill for specific performance.

The bill was rather vague in its statements, but it alleged that the testator, by his will dated in 1822, devised certain estates to his wife for life, and after her decease unto his sons, the Plaintiffs *Richard, Thomas and Edwin Thompson*, "in trust to sell and dispose of the same, for the best price, or sum or sums of money that could be had or gotten for the same;" and he declared that their receipts should be good and sufficient discharges to any purchaser for the purchase money. The bill did not state any trusts on which the produce was to be held.

The widow became indebted to *Blackstone* during the Plaintiffs' minority, and deposited with him the title deeds of the estate: *Richard* also became indebted to *Blackstone*.

The widow died in 1839, and in 1840, *Richard*, on behalf of himself and the other Plaintiffs (*Thomas and Edwin*) agreed with *Blackstone* for the sale to him of the property for 620*l.*, of which sum, 240*l.* was to be retained for the debts due to him from the widow and *Richard*, but *Richard Thompson* was "to be accountable to the estate of the said testator for the sum of 620*l.*" An agreement in writing was executed, whereby *Blackstone* agreed to purchase the property for 380*l.*

The bill prayed a specific performance, and that the Defendant might pay the residue of the 380*l.*

There

There were statements in the bill which tended, though not very distinctly, to shew, that there were trusts to be performed; as, that a Mr. *Charlwood* and his wife were beneficially interested under the will of the testator, that the three sons, "*in the execution of the trusts of the will of the testator*," prepared conditions of sale of the property.

1848.
THOMPSON
v.
BLACKSTONE.

The Defendant demurred to the bill for want of equity.

Mr. *Pemberton Leigh* and Mr. *Hardy*, in support of the demurrer, argued, that, upon the face of the bill, it appeared that the trustee had entered into an engagement to sell trust property, a part of the produce of which was, according to the terms of the agreement, to be applied in payment of the private debt of the trustee and of the widow. That this Court would not enforce a contract involving a breach of trust (a), and that, therefore, there was no equity to support the bill. They objected also that *Charlwood* and wife were necessary parties.

Mr. *Kindersley* and Mr. *Bromhead*, *contra*, contended that, upon the face of the bill, there appeared no trusts to perform, except the trust to sell the property. That it must be assumed, that the purchase money belonged beneficially to the vendors; or, at all events, there being no trusts declared, that it belonged, as a resulting trust, to *Richard* the heir-at-law.

Mr. *Pemberton Leigh*, in reply. The bill shews that there are existing trusts under the will to be performed. It is not shewn that *Richard* is the heir-at-law; and it is

(a) See *Ord v. Noel*, 5 Mad. 438. *Wood v. Richardson*, 4 *Bea-can*, 174.

1843.
 THOMPSON
 v.
 BLACKSTONE.

is a mere assumption that there is any resulting trust. A purchaser having notice of the improper mode in which the purchase-money is to be applied, cannot safely complete. He would be himself joining in a breach of trust.

The MASTER of the ROLLS.

This bill is filed for the specific performance of the agreement, for the sale of the estate in question. The Plaintiffs state that, at the time it was entered into, there was an agreement and understanding between them to this effect. The Plaintiffs agreed to sell this estate to the Defendant for 620*l.*, of which 240*l.* was to be retained by the purchaser, in satisfaction of a debt due to him from the widow and one of the vendors, and the remainder was to be paid over to the Plaintiffs. The Plaintiffs, receiving 380*l.* only, were "to be accountable to the estate of the said testator deceased" for the full sum of 620*l.*, and the sum of 240*l.*, part of the purchase-money, was to be applied in satisfaction of a debt, which, from the other statements of the bill, appears to be a debt originally due, in part from the widow of the testator, and as to the rest, from the Plaintiff *Richard Thompson* himself. 620*l.* is distinctly stated to be the sum for which the Plaintiffs were to be accountable to the estate, and 240*l.* of that, by the arrangement, was to be applied to debts due from other persons, and not from the estate of the testator. Is not that necessarily a breach of trust, if there be any trust alleged?

There is a trust alleged, which, though not very distinct, is more than sufficient to prevent such a contract as this being carried into effect by the aid of this Court upon a bill for specific performance.

A beneficial

A beneficial interest is alleged, as well as a trust for sale; yet I am desired to suppose, that the trust for sale was without any object, so that there was a resulting trust for the benefit of the heir; and I am further to assume, that one of these Plaintiffs is the heir, though he is not so stated to be. I cannot assume either of these facts, especially when I find this statement, that the trustees for sale are to be accountable to the estate of the testator for the whole amount of the purchase-money, and words which, though somewhat vague, shew an interest in *Charlwood* and his wife. I think there is sufficient to shew that there is a trust to be carried into effect under the will, and that that which is sought to be carried into effect is a deviation from those trusts. I think on that ground, that this demurrer ought to be allowed.

It is unnecessary to say any thing as to parties.

Mortlock v. Buller, 10 Ves. 292. *Ord v. Noel*, 5 Mad. 438. *Wood v. Richardson*, 4 Beavan, 174.

1843.
THOMPSON
v.
BLACKSTONE.

1843.

July 5. 7.

ARCHER v. HUDSON.

The Plaintiff having obtained the common injunction upon the allowance of exceptions for insufficiency, procured an order to amend without prejudice to the injunction, undertaking to amend within a week, and that the Defendant might answer the exceptions and amendments together. The amendments having been made accordingly, the Court extended the common injunction to stay trial.

THE bill in this case prayed for the common injunction. On the 26th of *June*, the Defendant's answer was found insufficient by the Master, and the Plaintiffs thereupon obtained the common injunction.

On the 27th of *June*, the Plaintiffs obtained an order to amend their bill without prejudice to the injunction; and that the Defendant might answer the exceptions and amendments at the same time, the Plaintiffs undertaking to amend within a week. The bill was amended accordingly.

On the 30th of *June* notice of trial was given for the next assizes at *York*, where the commission day was appointed for the 12th of *July*.

A motion was now made, on the usual affidavit, to extend the common injunction to stay trial. The truth of the amendments was also verified by affidavit.

Mr. *Pemberton Leigh* and Mr. *Rolt*, in support of the motion.

Mr. *Turner* and Mr. *Elmsley* opposed the motion, insisting that, according to the practice, the common injunction could not be extended upon an amended bill, especially on the eve of trial.

Howard v. Cliffe, before Lord *Cottenham* (10th May 1839), *Mellor v. Cresswell* (a), *Simes v. Duff* (b), and the

(a) 2 *Mylne & K.* 616.

(b) 9 *Sim.* 270.

the second and third Orders of 9th of *May* 1839 (a) were cited.

1843.
ARCHE
v.
HUDSON.

The MASTER of the ROLLS.

It is very important that this Court should strictly adhere to any rule laid down by the Lord Chancellor; and whatever I may think, yet, if the authority of *Howard v. Cliffe* applies, I must refuse this application. I will inquire what orders had been made in that case, and mention the case on *Friday*. If the authority applies, I shall not have the least hesitation in refusing this application.

The general Orders which have been now referred to, do not seem to have been brought under the consideration of the Lord Chancellor in that case. I have a perfect recollection of the reason for those general Orders, and of all the inconveniences they were intended to remove.

The order to extend the common injunction has never been understood to make it a fresh injunction: it is an extension of the same injunction, and an order to dissolve, dissolves the whole.

The MASTER of the ROLLS, after referring to the orders made in *Howard v. Cliffe*, made the order extending the injunction.

July 7.

(a) *Ord. Can. 135, 156.*

NOTE.—See *Brown v. Reina*, 3 *Younge & J.* 389. *Martin v. Mortlock*, 1 *Newland's Pr.* 356. *Goddard v. Smith, Rolls, May 30, 1844. Stratford v. Lewis, V. C. E.*, 22d *May*, 1844.

1843.

June 8, 9.
July 8.

King *Charles the Second*, by letters patent, granted some property in fee, subject to a fee farm rent, and to a proviso of re-entry, in case a decree should be made at the suit of the King for repairing the property, and the same should afterwards remain for a year out of repair.

The Crown afterwards granted away the rent. Held, that the proviso for re-entry could not be exercised, and that it therefore formed no objection to the title to the property.

By the conditions of sale, no further evidence of identity was

to be required than what was afforded by the abstract and the documents therein abstracted. The descriptions in the documents differed amongst themselves, and from the description in the particulars of sale. Held, that the purchaser was entitled to have further proof of the identity.

One general exception was taken to the Master's report of a good title, which did not point out the objections to the title. The Court disapproved of this inconvenient mode of proceeding.

FLOWER v. HARTOPP.

A WATER corn-mill and premises were sold under the decree of the Court, and a reference was made to the Master to inquire and state whether a good title could be made thereto.

Upon that reference, it appeared, that by letters patent dated the 8th of *April* 1635, King *Charles I.* granted to *Edward Ferrers* and *William Ferrers*, their heirs and assigns, "all those water and corn mills beneath the Castle of *Leicester* with all soke and suit to the same belonging &c." (which was alleged to be the property sold), yielding a fee farm rent of 1*l.* to the King, subject to the following proviso: —

"That if, at any time thereafter, any mill thereby granted should be in decay, or totally ruined, thrown down or prostrated, and any cause, suit or plea should be instituted or mooted in the Court of the Duchy of *Lancaster*, on behalf of the King, his heirs or successors, against any tenant, farmer or occupier of the mills and other premises, for not repairing, sustaining and maintaining the same, or any of them, or on account of the same being totally ruined, prostrated or subverted; and a decree or decrees should be made by the said Court, for repairing and sustaining of all or any of the said

mills.

to be required than what was afforded by the abstract and the documents therein abstracted. The descriptions in the documents differed amongst themselves, and from the description in the particulars of sale. Held, that the purchaser was entitled to have further proof of the identity.

One general exception was taken to the Master's report of a good title, which did not point out the objections to the title. The Court disapproved of this inconvenient mode of proceeding.

mill and other premises, and for the preserving, keeping and maintaining them in good state and repair, or for newly building, erecting or constructing them, or any of them; and nevertheless, the tenant, farmer or occupier thereof, should not, within one year next after such decree or decrees so, from time to time, made, repair, maintain, sustain, erect, build or otherwise restore the same mill, according to the form or effect of such decree or decrees, that then and so often it should be lawful for the King, his heirs and successors, into all or any of the said mill or mills, for the repairing, maintaining, newly building or erecting of which such decree or decrees shall have been made, *to re-enter the same, and to have again and repossess for ever, any thing in the letters patent to the contrary notwithstanding.*"

The letters patent also contained a covenant, on the part of the King, not to build any other water mill upon any stream on which any mill thereby granted was erected, or any wind or horse mill within any manor, field, or place in which any wind or horse mill then stood, or in any place near the mills thereby granted, whereby any injury could arise to them.

The property thus granted to *Edward Ferrers* and *William Ferrers* was, in 1636, conveyed by them to *Edward Moseley*, and afterwards, in the same year, by him to the Corporation of *Leicester*, and, in 1686, by the Corporation of *Leicester* to *Lawrence Carter*, under whose will, dated 1771, it was sold, and at length it became vested in *Lewthwaite Flower*, whose estate was administered in this cause.

The fee-farm rent was afterwards sold and conveyed under the statutes of *Charles II.* (a), to the trustees of *Colston's*

(a) 22 Car. 2. c. 6. and 22 & 23 Car. 2. c. 24.

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FLOWER  
v.  
HARTOPP.

1843.

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FLOWER

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HARTOPP.

Colston's Hospital in Bristol, in whom the same was now vested.

This property being sold in this suit, a reference as to the title was made to the Master, who having reported in favour thereof, the case came on, upon an exception to his report. There were two objections, first, that the estate was subject to a right of re-entry, either in the Crown or in the grantee of the Crown; the second related to the identity, with respect to which it is necessary further to state, that, by the sixth condition of sale, it was provided as follows:—“That no further evidence of identity of the parcels shall be required, than what is afforded by the abstract, or the deeds, instruments or other documents therein abstracted.”

The modern description in the particulars of sale differed from that in the will, letters patent, and subsequent deeds; and the description in the will, differed from the former instruments, the descriptions in which were not precisely the same.

Mr. Turner and Mr. Heathfield, for the purchaser, in support of the exception. The vendor can have no title to the assistance of this Court, unless he is able to give to the purchaser a secure title to the possession of the property for the term which he has contracted for. *Fildes v. Hooker.* (a) Here the Plaintiff has sold the fee simple, subject only to a rent, and to the ordinary remedies for recovering it: nothing is stated in the conditions of sale, of the condition by which the estate might be wholly defeated. The right of re-entry is shewn to exist, and no presumption can be raised against

this

(a) 3 *Mad.* 193.

this express reservation. *Adair v. Shafloe.* (a) A purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shewn only by presumption. *Barnwell v. Harris.* (b) The consideration was reserved for the benefit of the King's subjects or his tenants; and if the vendor alleges that it is neither in the King nor in the purchaser of the fee-farm rent, he must shew, clearly and distinctly, how it has been destroyed.

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FLOWER
v.
HARTOPP.

The identity of the property is not sufficiently shewn; notwithstanding the conditions of sale, the identity must be proved; it is only by proving the identity of the property that you can shew that the abstracted deeds relate to it. To evidence a good title to property by the abstracted deeds, you must shew that the deeds relate to that very property.

The conditions of sale are catching, and not to be favoured. *Taylor v. Martindale* (c); *Southby v. Hutt.* (d)

Mr. *Pemberton Leigh* and Mr. *G. L. Russell* for the Plaintiff. The purchaser has wholly failed in shewing that the proviso for re-entry exists. If it does now exist, it must either be in the Crown, or in the purchaser of the rent. It cannot be in, or be exercised by the Crown, for by re-entering, the Crown would not only defeat the estate of the vendor, but also the rent granted by it to *Colston's Hospital*, and the effect would be to get back the property, discharged of the rent. The Crown cannot defeat its own grant of the rent. The statute of *Charles II.* (e) vests the rent in the grantees absolutely, and

(a) Mentioned in 19 <i>Fez.</i> p. 156.	(d) 2 <i>Myl. & Cr.</i> 207.; and see <i>Hyde v. Dallaway</i> , 4 <i>Beavan</i> , 606.
(b) 1 <i>Taunt.</i> 430.	
(c) 1 <i>Y. & Col. (C. C.)</i> 658.	(e) 22 <i>Car. 2. c. 6. s. 4.</i>

1848.
 FLOWER
 v.
 HARTOPP.

and provides that the grant is to be expounded most beneficially for the patentees and grantees of the rent. It became impossible, therefore, for the Crown to take advantage of the condition for re-entry. On the other hand, the right of re-entry cannot be in the purchaser of the rent, because, by the common law, no assignee of a reversion can take advantage of a re-entry by force of any condition, and the grant was not of a reversion within the statute 32 Hen. 8. c. 34.; again the owner of the fee-farm rent cannot have, at the suit of the Crown, that decree, upon which alone the right of re-entry is to be founded. It cannot therefore now exist, and, after the long possession, it must be presumed to be extinguished. *Gibson v. Clark.* (a) If the right does exist, it can only arise upon a decree in the Duchy court at the suit of the Crown, which never could be obtained.

The identity is proved according to the express terms of the conditions of sale. The purchaser is entitled to no further evidence of the identity than what is afforded by the abstract.

Though there may be a variation in description, it may be accounted for by the ordinary changes which property undergoes by lapse of time. There is a sufficient moral certainty of the property being the same, and it is fortified by the fact of the long possession.

Mr. Turner, in reply.

Lord Braybroke v. Inskip (b), *Lyddall v. Weston* (c), were also cited.

The

(a) 1 *Jac. & W.* 159.
 (b) 8 *Yes.* 417.

(c) 2 *Atk.* 19.

The Master of the Rolls.

In this case two objections are taken to the title. The first as to the right of re-entry on the part of the Crown; the second as to the identity of the parcels.

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Flower
v.
Hartopp.

With respect to the first, which is the important objection, I will take time to consider it. It may be necessary to have it decided in another place.

As to the question of identity, I am not satisfied with the evidence produced before the Master. The vendor goes to a sale with a certain description of the property in his particulars, and he has a condition of sale which says: "That no further evidence of the identity of the parcels shall be required, than what is afforded by the abstract, or the deeds, instruments, or other documents therein abstracted."

When these instruments are looked into, we find that the description contained in the last, which is a will of not less than seventy years old, differs from the description in the particulars. Then, it was justly said, you are not to confine yourself to the will, but you are to look at the other instruments stated in the abstract; and if you find that the words used in the will, being modified when compared with the expressions used in the previous deeds, induce a conclusion which identifies the property with the description contained in the particulars, then the vendor has done all that can be required. But, upon looking back to the other descriptions contained in the three or four previous instruments, it is found that they vary more than the last instrument, from the description contained in the particulars. This, therefore, does not aid the vendor, but rather makes the identity more difficult. The lapse of

1843.

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 FLOWER  
 v.  
 HARTOPP.

seventy years would well justify a change in the state of the property, and a variation in the description; but the instant you have a variation in the deeds, the description in the deeds cannot, of itself, be evidence of the description contained in the particulars: something else must be introduced to correct them; and therefore, although the purchaser may not be entitled to require any further evidence of the identity of the parcels than what is afforded by the deeds, yet he is entitled to have what he has bought distinguished, and without that, it cannot be said by the vendor that he has proved, by the instruments, the parcels described in the particulars. It is very possible that a short affidavit might remove the difficulty, but I think, as the matter at present stands, the exception, as to the identity, must be referred back to the Master, unless the parties agree on some other course.

I will reserve the other question.

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July 8.

*The Master of the Rolls.*

This case comes on upon an exception to the Master's report dated the 3d day of *March 1843*, finding that a good title was shewn to an estate purchased by the exceptant under the decree of the court.

On the hearing of the exception, two points only were raised in argument. It was alleged, first, that the estate was subject to a right of re-entry, either in the Crown or in the grantee of the Crown; and, secondly, that the identity of the premises sold, with the premises to which the vendor has made out a title, was not sufficiently established. Upon the second point, I thought the exception

exception good; as to the first, I reserved the question for further consideration.

The title is traced up to the letters patent dated the 8th day of *April* 1635 (11 *Car.* 1.), whereby, that which is alleged to be, and which for the present purpose must be assumed to be, the property in question, was granted to *Edward Ferrers* and *Williams Ferrers* in fee, yielding a fee-farm rent of 17*l.* to the King.

The property in question was in part described as "all those water and corn-mills beneath the Castle of *Leicester* with all soke and suit to the same mills belonging." And the letters patent contained a proviso "That if at any time thereafter," &c.

The property thus granted to *Edward Ferrers* and *William Ferrers* was by them conveyed to *Edward Moseley*, and afterwards by him to the Corporation of *Leicester*, and, at a subsequent period, by the Corporation of *Leicester* to *Lawrence Carter*, under whose will it was sold, and at length it became vested in *Lewthwaite Flower*, whose estate is administered in this cause. The proviso for re-entry which is contained in the letters patent, was not noticed in the particulars and conditions of sale; and the question is, whether the right of re-entry is now in force; for if it is, the vendor cannot compel the purchaser to complete the purchase.

It does not appear that the right of re-entry was ever made the subject of any grant or release, but the fee-farm rent, which was all the interest reserved to the Crown by the letters patent, was some time afterwards granted to, and is now vested in, the trustees of *Colston's Hospital* at *Bristol*.

1843.

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FLOWER

v.

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 FLOWER
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 HARTOPP.

The purchaser alleges that the existence of the fee-farm rent proves the existence of the right of re-entry, or, at least, that it ought to be proved by the vendor that the right of re-entry is extinct. His argument is shortly this: the right exists or not; if it exists, it is either in the Crown or in the grantee of the fee-farm rent, and to the purchaser it is immaterial which; and if it does not exist, the vendor ought to shew how it has been destroyed.

The vendor scarcely, if at all, objects to the form or substance of the argument; but he insists, that at this time, there is no right of re-entry, for if any, it is true, as the purchaser says, that it must be in the Crown, or in the grantee of the fee-farm rent; it cannot be in the grantee of the fee-farm rent, because the grant was not of a reversion within the statute 32 Hen. 8. c. 34., and also because the owner of the fee farm rent cannot have, at the suit of the King, that decree upon which alone the right of re-entry is to be founded; and it cannot be in the Crown, because the exercise of it would defeat the grant of the fee-farm rent.

The argument of the vendor appears to me to be valid. There is nothing to countenance the conjecture made by the purchaser, that the right of re-entry was reserved by the Crown for the public benefit, to secure the existence of a mill where corn can be ground. The whole interest of the Crown has been alienated. The right of re-entry could only be enforced under a decree obtained at the suit of the Crown. The re-entry, if obtained, would make void, *ab initio*, the estate granted by the letters patent, and defeat the rent charge; and, on consideration of the nature of the proviso, the alienation of the fee-farm rents, and the effect of the statutes, (32 Hen. 8. c. 34. 22 Car. 2. c. 6. and 22 & 23 Car.

Car. 2. c. 24.) I am of opinion, that there is not, under the proviso, any right of re-entry which can now be enforced. I must therefore overrule the exception, so far as it is founded on the objection that such right of re-entry is in force.

Refer it back to the Master, upon the objection that the property described in the abstract is not sufficiently identified with the property described in the printed particulars.

One general exception only had been taken to the report, "for that the Master had certified that a good title was shewn to the property, whereas the Master ought not to have so certified."

It was objected, that the form was improper, and that the purchaser ought to have specified the objections on which he intended to rely, and costs were, in consequence, asked against the exceptant.

The MASTER of the ROLLS disapproved of the mode in which the questions had been presented to the court, and held, that the order now made ought to specify the objections insisted on by the exceptant: he said, however, that he could make no special order as to costs.

1843.
FLOWER
v.
HARTOPP.

1843.

July 18.

CANEY v. BOND.

Part of a testator's assets consisted of a promissory note. The executor, though requested by the parties interested so to do, neglected to get it in; and about two years afterwards it was lost by the insolvency of the debtor. Held, that the executor was personally liable.

THE object of the suit was to make an executor liable for a sum of money which had been lost by the insolvency of the debtor, on whose personal security the debt had been allowed by the executor to remain.

In 1825, the testator advanced to a Mr. *Phillips* a sum of 500*l.*, to be invested by the latter on some mortgage security. For securing it in the meantime, Mr. *Phillips* gave to the testator his promissory note, payable with interest.

In January 1826, the testator died, and his will was proved by *Jones* and *Bond*, his executors. Shortly afterwards, *Jones* and one of the persons interested in the testator's estate, pressed *Bond* to call in this debt, and invest it in the funds; but *Bond* replied, "that he should not think of removing the money from Mr. *Phillips*'s hands, as it was as safe there as if it were in the Bank of *England*." Other similar applications were afterwards made to *Bond*, but with no better success. In 1827 *Bond* received 100*l.* from Mr. *Phillips*, in part payment, and the remainder was lost by the death and insolvency of Mr. *Phillips* in March 1828. There was evidence to shew that Mr. *Phillips*, if pressed earlier, would have paid the amount.

Under these circumstances, it was insisted, by the bill, that *Bond* was personally liable for the 400*l.* and interest.

Mr.

Mr. G. L. Russell (in the absence of Mr. Pemberton Leigh), for the Plaintiff, cited *Lowson v. Copeland* (a), *Powell v. Evans* (b), *Clough v. Bond*. (c)

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CANEY  
v.  
BOND.

Mr. Kindersley and Mr. Lovat, for *Bond*.

Mr. Turner and Mr. Elderton, for another Defendant.

*The Master of the Rolls.*

At the death of the testator, part of his estate was outstanding on personal security. It was the duty of the executors, quite independently of any application being made to them by the persons interested in the estate, to take steps to get in this money. In the exercise of a fair discretion, they were not to commence legal proceedings unnecessarily, but they ought to have exerted themselves to get in the debt, and, if necessary, to have commenced compulsory proceedings to obtain it.

The persons beneficially interested, not considering the money safe where it was, requested the Defendant *Bond* to get it in. Instead of complying with this request, he refused to do so, saying that the money was as safe as in the Bank of *England*; two years afterwards the money was lost by the insolvency of the debtor.

If, in any case, an executor is to be charged for wilful default, it is in a case of this sort, where the money not only is found on a security not sanctioned by the Court, and which ought therefore to be got in, but where also the executor has been requested to call it in, and has refused on the ground that it is perfectly safe.

The

(a) 2 B. C. C. 156.

(c) 3 Myl. & Cr. 490.

(b) 5 Ves. 839.

1843.

CANEY

v.

BOND.

July 17. 22.

JONES *v.* POWELL.

An executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stock broker for identifying him at the Bank. He was allowed the payment in passing his accounts.

THE testator gave to each of his three children 20,000*l.*, and he directed that during their minorities, their legacies should be invested in their names in the funds. By the terms of the will, the trustees were authorised to retain, out of the estate, all costs, damages, and expenses which they might sustain in the execution of the trusts.

The three children being infants, Mr. *Paterson*, the executor, transferred three sums of 21,728*l.* 8*s.*, 3 per cents. (being the amount which would have been purchased with the legacies after deducting the legacy duty), from the name of the executor to the names of the executor and the infants.

He paid to the stock broker for such three transfers, one sixteenth per cent. or 40*l.* 14*s.* 10*d.* On passing his accounts before the Master, Mr. *Paterson* was allowed 6*l.* 6*s.* only for the fee on such transfers.

There were three other sums of 36*l.* 5*s.*, 42*l.* 18*s.* 4*d.*, and 9*l.* 14*s.* 5*d.*, charged by the executor for fees on transfers of other stock, for which the Master respectively allowed 2*l.* 2*s.*, 6*l.* 6*s.*, and 2*l.* 2*s.* only. All the transfers had been made previous to the institution of the suit.

The

The charges for expenses to brokers for transfers therefore amounted to 96*l.* 12*s.*, which the Master disallowed except as to sixteen guineas.

1843

JONES

a.

POWELL.

The Defendant *Paterson* took exceptions to the Master's report, insisting that the whole 96*l.* 12*s.* ought to have been allowed him in passing his accounts.

In support of the charge, five stock brokers deposed, that it was the custom of stock brokers always to receive one sixteenth per cent. for transfers (except where no charge was made); and one of them said, that according to the rule of the Bank of *England*, the executor would not have been allowed to make the transfer without a sworn broker, or his representatives, being present to identify him as a proper person to make the same.

On the other hand, the clerk of a respectable firm of solicitors stated, that he had been for twenty years past in the habit of attending at various times at the Bank of *England*, for the purpose of identifying persons making transfers of stock standing in their names, and that he was well acquainted with the practice of the Bank of *England* on the transfer of such stock. That any proprietor of government stocks transferable at the Bank of *England* was capable of transferring the same, without the intervention or assistance of any broker or member of the Stock Exchange, upon being identified by some person known to some clerk or clerks in the said Bank of *England*. That his employers were not brokers or members of the Stock Exchange, nor was the witness.

Another witness stated that he had been, for a period of eighteen years, a clerk in the banking-house of Messrs.

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 JONES  
 v.  
 POWELL.

Messrs. *Barclay, Bevan* and Co., and that he was well acquainted with the practice of the Bank of *England* on the transfer of stock, and on other matters. That any proprietor of government stock transferable at the Bank of *England*, was capable of transferring the same, without the intervention or assistance of any broker or member of the Stock Exchange, upon being identified by some person known to some clerk or clerks in the said Bank of *England*, and that he and his employers were frequently in the habit of attending at the Bank for the purpose of transferring stocks belonging to customers of his said employers, and identifying the parties intending to make the same; and that, in such instances, no broker or member of the Stock Exchange was employed in the matter.

Mr. *Pemberton Leigh* and Mr. *Renshaw*, for Mr. *Paterson* (a), in support of the exceptions. The executor ought to be allowed the usual charges paid by him for the transfer. It is the ordinary practice to employ a broker in effecting a transfer of funds, and the invariable charge is clearly proved, by the evidence, to be one sixteenth per cent., and it is even stated that the Bank would not permit a transfer without a broker being present to identify the transfer. The duty of the broker in this case was more than to identify, he was to make a calculation of what sum of stock, according to the market price at the moment, and which constantly varies, could be purchased with the legacy in sterling money after deducting the duty. The sums transferred were very large, and, according to the practice, this sort of charge has always been allowed to executors.

Mr.

(a) The exceptions, though taken nominally by the Defendant *Paterson*, were understood to have been, in reality, brought forward by the Committee of the Stock Exchange.

Mr. *Kindersley* and Mr. *Tyrrell*, *contra*. This case has been brought forward by the Stock Exchange, and the brokers who have made affidavits are interested in supporting this unreasonable charge: the evidence is therefore to be regarded with some suspicion.

1843.  
JONES  
v.  
POWELL.

The Bank are bound by law to allow a transfer to be made in their books without charge, and the interference of a broker is altogether unnecessary. All that the Bank requires for their protection is, that the party shall be identified by any respectable person known to them, as by a banker or his clerk; only one of the several brokers swears that the intervention of a broker is indispensable, and that is contradicted by two witnesses. The employment of a broker implies a buying and selling, which a transfer is not. Supposing, however, that it is necessary to employ a broker, it is perfectly unreasonable to allow a per centage for identifying, the trouble being in no way increased by the amount. The sum of one guinea only is allowed to the broker of the Accountant-General; and where executors were ordered to transfer a fund into Court, and paid 12*l.* for the transfer, one guinea alone was allowed them; *Hopkinson v. Roe.* (a) It is preposterous to say that 96*l.* 12*s.* is a reasonable sum to pay a broker for walking to the Bank, and saying "This is Mr. *Patterson*." The executor might have got his banker or his clerk to identify him at an expense of a guinea.

The Master is therefore right, and the exceptions to his report ought to be overruled.

Mr. *Benson*, for another party, supported the Master's report.

Mr.

(a) 1 *Beavan*, 183.

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JONES  
v.  
POWELL.

Mr. *Pemberton Leigh*, in reply. *Hopkinson v. Roe* does not apply. There the transfer was into Court, and the charge is settled by arrangement with the Accountant-General's broker.

*The Master of the Rolls* said he would make inquiries as to the practice, and how these sort of matters had been usually dealt with in the Master's offices, because if there had been a habit of allowing to executors the expense of transfers, then, in the present case, in which no special circumstances had been proved, the sums paid ought to be allowed. He added, that he thought that the case of *Hopkinson v. Roe* did not apply to this case.

July 22.

*The Master of the Rolls*, after making inquiries, allowed the exceptions to the Master's report, thereby deciding that the executor was entitled to the sums paid by him to the stock broker.

July 17.

#### GREENWOOD v. ROTHWELL.

Devise to *A.* for his life, and from and after his decease, "unto all and every the issue of the body of the said *A.*, share and share alike, as tenants in common, and the heirs of such issue."

THE testator, *John Mitchell*, by his will, dated in 1811, after directing his debts and legacies to be paid out of his real and personal estate, devised as follows:—"I also give and devise unto *Jonas Greenwood*, the son of my late brother-in-law *Joseph Greenwood*, all my lands and hereditaments situate in *Clayton* aforesaid, and now in occupation of *John Mortimer*; and also

Held, that *A.* took an estate for life only.

also all other my messuages, cottages, lands, and tenements situate in *Clayton* aforesaid, *for and during the natural life of the said Jonas Greenwood*; and from and after his decease, I give and devise the said premises unto all and every *the issue of the body of the said Jonas Greenwood, share and share alike, as tenants in common, and the heirs of such issue.*"

*Jonas Greenwood* survived the testator, and died in 1840.

This bill was filed by the children of *Jonas Greenwood*, insisting that, under the will, he took a life estate only. It alleged that, in 1823, he conveyed the property by lease and release to *Abraham Tempest* in fee, and to bar the estate tail, *Jonas Greenwood* thereby covenanted to levy a fine, which the bill stated "had been levied accordingly."

To this bill the Defendant pleaded that *Jonas Greenwood* levied the fine *with proclamations*; and averred that the estate and interest which the Plaintiffs would otherwise have had was thereby barred and extinguished.

The plea came on upon the 22d of *June 1842*, when a case was directed to the Common Pleas on the construction of the devise. That Court certified that *Jonas Greenwood* took an estate for life. (a)

The plea now came on for argument.

Mr. *Pemberton Leigh* and Mr. *Rogers*, for the Defendant.

Mr.

(a) 6 *Scott, (N.R.) 670.*

1843.  
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GREENWOOD
v.
ROTAWELL.

1843.
 GREENWOOD
 v.
 ROTHWELL.

Mr. Turner and Mr. Thomas Turner, for the Plaintiffs.

The Master of the Rolls.

In cases of this sort, you are to consider the rules of law and apply them to the particular cases, having regard to the intention of the testator, to be collected from all the words of the will.

Here there is a gift, in the first instance, expressly for life; therefore, so far, there is a clear intention that *Jonas* should only take a life estate. The next gift is after his decease, to "all and every the issue of the body of the said *Jonas Greenwood*, share and share alike, as tenants in common."

The word, issue, by itself is ambiguous; it may mean the children of *Jonas*, or it may mean the issue of *Jonas* intended to take in a certain order of succession for ever. But under what circumstances are they to take here? What are the *indicia* of intention? "All and every of the issue" are to take, "share and share alike as tenants in common." There is to be a distribution among them, and there is a superadded limitation "to the heirs of such issue."

There is therefore a distinct gift to a person for life, and after his death, to his issue, share and share alike, and with the word "heirs" superadded. This does not look like an intention that they should take in perpetual succession. It is to be further observed, that the gift over, which has been relied on in other cases, is wholly wanting here.

The distinctions in all these cases are very nice. The Court must carefully look at all the *indicia* of intention, and looking at them in this case, I am not satisfied that

that the decision of the Court of Common Pleas is erroneous. I believe it is consistent with the other authorities, and I do not think it ought to be disturbed.

Over-rule the plea without costs, and let the Defendant have a month's time to answer.

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GREENWOOD
v.
ROTHWELL.

MADGWICK v. WIMBLE.

July 15.

IN June 1839, Messrs. *Warner, Attwood, and Wimble* entered into partnership for a term of years. By the deed of partnership it was provided, that *Attwood* was to be entitled to introduce his eldest son as an apprentice, and, after the expiration of the apprenticeship, he was to be at liberty to transfer to such eldest son his own share and interest in the said partnership. "And in case the said *William Attwood* should depart this life during the continuance of any such partnership, leaving his said eldest son qualified to take his father's share in the said partnership concerns, such son should be entitled to succeed thereto, and become a partner with the other or others. But if *Attwood* should depart this life, leaving his eldest son him surviving, who should be disqualified for immediately taking his father's share, by reason only of minority, then that the executors of *Attwood* should be entitled to hold *Attwood's* share in the said partnership during such minority, allowing to *Warner* 100*l.* per annum, out of their share of profits, as an equivalent for his personal attention, and should transfer the same share to such son on his attaining full age. Provided always, that such son of the said *William Attwood* should not be entitled to

Difficulties in appointing a receiver of a partnership upon motion.

Surviving partners insisted on continuing the partnership with the assets of a deceased partner. The Court thought the representatives of the latter entitled to a receiver.

Partnership stipulation, that a son of one partner, or in case of his minority, the executor should, on the death of such partner, succeed to his share. The Court, on the terms of the partnership deed, considered it an option, and not an obligation.

become

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become a partner, unless he should be of good character and competent ability, and that any party thereto might object to his admission as such partner, for want of such qualification, and might require a decision thereon to be made by arbitration. And in case *Attwood* should so die, leaving a widow, but not such son entitled to succeed to his share of the said copartnership, or if any such son should become disqualified therefrom, or should die in the lifetime of his mother, then such widow of *Attwood* should be entitled to receive, not only during the remainder of the seven years, but also during such further term as the said trade should be carried on under the provisions of the deed, an annuity of 100*l.*, to be paid by quarterly payments by the party or parties carrying on the same trade, in proportion to their respective shares of profit, and to commence from the time when *Attwood* or his executors, or his son, entitled as aforesaid, should cease to have any share in the profits of the said trade."

Provision was afterwards made for the event of the death of *Wimble* or *Warner*.

A lease for twenty-one years was at the same time granted by *Attwood* of some property to the three partners, in trust for the partnership.

Attwood died in November 1841, leaving his son a minor, and his widow alone proved his will. On her death, in May 1842, the Plaintiff proved his will, and gave notice to the surviving partners, that he declined to take the testator's share for the purpose of carrying on the trade for the benefit of his estate, or of his eldest son.

The surviving partners, however, continuing to carry on the trade as theretofore, the executors of *Attwood* filed

filed this bill to have the partnership affairs wound up, and for a receiver and injunction. *Warner* insisted, that by the terms of the partnership, the surviving partners had a right to continue the capital of *Attwood* in the business; he stated that the widow, after proving the will, had continued the business with them, and had received her share of the profits of the permanent capital.

A motion was now made, on the part of the Plaintiff, for a receiver to get in the partnership property, and to sell the stock and effects belonging thereto, and for an injunction to restrain the surviving partners from carrying on the business in the name of the deceased partner.

Mr. *Pemberton Leigh* and Mr. *Renshaw*, in support of the motion. According to the true construction of the partnership deed, the son and executor of *Attwood* are entitled to an *option* of taking the share of *Attwood* in the business; but it is not obligatory on them to do so. Nothing has been done by the widow to bind the testator's estate by an adoption of the right. All she has done has been to receive monies on account. Supposing, however, that she had adopted it, that would not bind the present Plaintiff. He cannot be compelled to make himself personally responsible for the losses and liabilities of a partnership, in which he has no beneficial interest. There will be no limit to his liability if he enters into this partnership. Even if the testator had covenanted that his executor should carry on the business with the surviving partners after his death, the executor could not be compelled, against his will, to perform that obligation of his testator.

The estate of *Attwood* is insolvent, and all his assets are required for payment of his debts: they cannot therefore be wholly retained by his surviving partners.

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v.
WIMBLE.

The circumstances of this case require the appointment of a receiver for the protection of the testator's interests. Here there is a dissolution by the death of *Attwood*, and as to the rights of succeeding to the testator's share, *Kershaw v. Matthews* (a) decides, that when a partner has a right to appoint a person to succeed, upon his death, to his share in a business, and the person so appointed refuses to accept that share, or to comply with the stipulations, the partnership is dissolved. Here the Defendants, after dissolution, are continuing the trade with the testator's assets, and in the testator's name; this is a sufficient ground for the interposition of the Court; *Harding v. Glover*. (b) They also cited *Wilson v. Greenwood*. (c)

Mr. *Teed* and Mr. *Goodeve*, for *Wimble*, did not oppose the motion.

Mr. *Kindersley* and Mr. *Turner*, for the Defendant *Warner*. The terms of the partnership deed, and the conduct of the late executrix, entitle the surviving partners to continue the business in the mode pointed out by the partnership deed. The Court will not grant a receiver, except in cases of misconduct or insolvency; neither of which exists here. The object of appointing a receiver is to keep matters in *statu quo* till the hearing, but to appoint one in the present case, would be to stop the business, and destroy the good will; and thus put it out of the power of the Court to determine in favour of the Defendants at the hearing, for the subject in dispute will be then destroyed. The rule of the Court is not to interfere, upon an interlocutory application, in a way to prevent the real question between the parties being discussed.

(a) 2 *Russ.* 62.

(b) 18 *Vet.* 281.

(c) 1 *Swan.* 481.

cussed; *The Attorney-General v. The Corporation of Liverpool* (a); and it will not, on motion, decide the whole merits of the cause. (b)

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 v.
 WIMBLE.

It is said that *Attwood's* estate is insolvent; but there is no evidence of that fact; and even supposing it to be true, that would not give to his personal representatives the right of putting an end to the partnership contract: it is binding on the deceased partner and his property; and it is not to be released on the ground of insolvency. The Defendants have entered into the partnership and embarked their own capital therein, on the faith that the stipulations on the part of *Attwood* would be performed; besides this, the executrix by adopting the option, bound *Attwood's* estate, and the present Plaintiff cannot now recede from it.

Mr. Pemberton Leigh, in reply.

Where a partnership is dissolved, it is impossible that matters can remain in *statu quo*. It must, of necessity, be wound up by a sale, and every application of the partnership property inconsistent with winding it up is improper. *Crawshay v. Maule*. (c)

If the testator had covenanted that the business should be continued by his representatives after his death, and that his partners should retain the capital, still, if the executor or administrator refused to become a partner, the surviving partners could not insist on the performance of the stipulation. An action might be brought, and the assets might be liable, but no partnership could exist

(a) 1 *Myl. & Cr.* p. 207. *The Irish Society*, 1 *Myl. & Cr.*

(b) *The Skinners' Company v.* p. 163.

(c) 1 *Swan.* p. 507.



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exist without the assent of the executor, otherwise an executor or administrator might be compelled to join in a declining or insolvent concern, and subject himself, personally, to the gravest responsibility.

The MASTER of the ROLLS.

It must be admitted, that when an application is made for a receiver in partnership cases, the Court is always placed in a position of very great difficulty; on the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and, on the other hand, if it refuses the motion, it leaves the Defendant at liberty to go on with the partnership business, at the risk, and probably at the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the Court is under the necessity of adopting some mode of proceeding, to protect, according to the best view it can take of the matter, the interests of both parties, and it has accordingly interfered in many such cases.

The rights of the parties now in question depend upon the deed. The case seems to be this, that there was to be a partnership continued between them for a certain term of years, that is, if they all lived during that period. A separate provision was made for the event of the death of any or either of them. Upon the death of *Warner* or *Wimble*, a provision was made for the disposition of their interests; but, upon the death of *Attwood*, a different sort of provision was made, for he wished to secure for his son the advantage of becoming a member of the partnership, and a particular stipulation was entered into for that purpose, which was to this effect. [His Lordship stated it.]

Now

Now nobody can doubt what was the object of this agreement; it was the intention of *Attwood* the father to secure to his son, if he should be qualified at the time of his father's death, the right to become a member of this partnership; and in case he should not then be qualified, by reason of his minority only, then to secure to his executors a right to continue the partnership until the son attained his age of twenty-one, and then to assign to him.

It is said, that because the executors and the son were to have this right, they were therefore under an obligation to go on with the partnership, and undertake all the risks of it, under any circumstances whatever that might occur; and that the surviving partners, instead of being simply under the obligation of admitting them to be partners, were to have a right of compelling them to be partners, and to continue *Attwood's* property in the business. I cannot so construe the deed, and I do not think that this could be their meaning. It is not right for me now to put a final construction upon this deed, or to come to a final adjudication upon it, but, upon the consideration of two courses, both of which the Court would willingly avoid, as both must interfere with rights which may, by possibility, have to be hereafter determined, still when the question is, which course I am to adopt, I think, upon the construction of this deed, and bearing in mind that Mr. *Warner* insists that he has a right to keep the property of this testator in this concern, and to subject it to all the partnership risks and responsibilities until the hearing, I ought to interfere to protect this property. I will not interfere rashly, and, after stating my opinion, I think I ought to take a course which I have pursued on former occasions with great advantage to the parties, namely, to allow the matter to stand over, to enable the parties to communicate and come to

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some arrangement, by which these matters may be brought to a satisfactory conclusion without the interference of the Court. This would be for the mutual advantage of all parties. If necessary, however, I shall appoint a receiver, but I will not take that step unless the parties make it absolutely necessary for me to do so.

It might be the most proper course, on this occasion, to refer it to the Master to determine what course would be for the common advantage of all parties concerned to adopt. It may be proper that the surviving partners should continue the business for the purpose of winding it up.

The parties had better avoid the interference of this Court if they can. If they cannot, I must act upon this, as I did on one or two former occasions, when this mode of proceeding was not successful,—I must apply the power, which this Court has, of appointing a receiver, and take the matters out of the hands of both parties. I should be very sorry to do that, but it is my duty to do so, if the parties do not agree amongst themselves.

The parties afterwards referred the matters in difference to the arbitration of Mr. *James Parker*.

1843.

PRITT v. CLAY.

July 12, 13.
17. 21.

MESSRS. PRITT and Clay carried on business in partnership as solicitors. *Pratt* was entitled to two-thirds of the profits, and *Clay* to the remaining one-third.

In December 1831, *Pratt* died, leaving his partner surviving him; and in 1836, the representatives of *Pratt* filed their bill in this Court against *Clay*, for the purpose of having the partnership accounts taken, and for the ascertainment and payment of the share of *Pratt*. The Defendant put in his answer setting forth the accounts, but, by an error, arising altogether from ignorance of the fact, and not from fraud, a claim, which the firm had against the *Liverpool and Manchester Railway Company*, was omitted. A negotiation took place for the compromise of the suit, and the Plaintiffs ultimately agreed to accept from the Defendant the sum of 500*l.* "in full compromise, satisfaction, and discharge of and from all differences, claims, and demands." This sum was accordingly paid, and, in January 1840, the parties executed mutual releases from all actions, accounts, claims, &c., which they had or might have concerning the partnership, and the bill, by consent, was dismissed without costs.

The Defendant being afterwards called on by the Railway Company to make out all the bills of costs due from

then known to exist, was omitted in the consideration by both parties; *C. D.*, afterwards received it. Held, that *A. B.*, notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be re-opened.

A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item in which he was interested, having, by mistake, been omitted in the account. Held, that he was entitled to relief, but that to obtain it, the release must be wholly set aside.

A. B., the representative of a deceased partner, having filed his bill against *C. D.*, the surviving partner, for an account, *A. B.*, in consideration of 500*l.*, released *C. D.* from all claims, and the bill was dismissed. By mutual error a debt of 2000*l.* owing to the partnership, but which was not

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PRITT
v.
CLAY.

from them to the partnership, an examination of the books took place, and it was then discovered, to the surprise of the Defendant, that, though *Pritt*, who principally attended to the accounts, had sent in bills of costs against the Company down to the summer of 1831, yet that he had omitted costs to the extent of 1998*l*. This account was sent in and the amount paid to *Clay* the surviving partner. The representatives of *Pritt* then filed this bill, insisting that, notwithstanding the release, they were entitled to participate in this sum, the arrangement having taken place under the mutual error that no such claim as that against the Company existed.

Mr. *Pemberton Leigh* and Mr. *Rolt*, for the Plaintiffs.

The Solicitor-General (Sir *W.W. Follett*), Mr. *Tinney*, and Mr. *Bazalgette*, for the Defendant.

Harris v. Kemble (a) was referred to.

The MASTER of the ROLLS was of opinion that this item had been excluded by a common error. That, notwithstanding the release, the Defendant was not entitled to keep the whole benefit for himself, and that the mistake ought to be set right.

A question then arose, whether the Plaintiffs were entitled to a decree at once for two-thirds of the 1998*l*, or whether the whole accounts were to be opened, and this sum taken merely as an item in them.

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(a) 2 *Dow & Cl.* 463. and 5 *Bli.* 730

The MASTER of the ROLLS, on this point, reserved his judgment.

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The MASTER of the ROLLS.

July 21.

In this case I stated my opinion, that, notwithstanding the release which had been executed by the Plaintiffs, the Defendant was bound to account for the sum of 1998*l.* which he had received subsequently to the date of the release. The remaining question is in what mode he is to account?

The Plaintiffs by their bill allege, that the sum in question ought to be treated as so much clear profit realised on the behalf of the firm of *Pritt and Clay*, and ought to be divided and paid as such, upon the terms of the articles of partnership, thus giving two-third parts to the Plaintiffs, as representatives of *Pritt*, and leaving the remaining one-third part to the Defendant.

On the other hand, the Defendant insists, that in the event of his not being permitted to retain the whole sum for himself, it ought to be treated only as an item in the partnership accounts, which, in the same event, ought to be considered as entirely open.

I can have no doubt but that, at the time when the releases were given, both parties intended that all accounts and transactions relating to the partnership of *Pritt and Clay* should be closed. Neither of them anticipated that any thing would occur to disturb the arrangement then concluded. The Defendant, thinking that he had satisfied the liabilities of the late firm, and expecting to receive no more than appeared probable from the result of his examination of the books and accounts,

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accounts, which result he had stated in the schedule to his second answer in the former suit, did not anticipate that he would or could again be called upon by the Plaintiffs to account for any subsequent receipts, and in that faith, he executed the release which he gave to the Plaintiffs. It has happened that, under the circumstances which have occurred, the Plaintiffs appear to me to have a right to call upon the Defendant to account for a subsequent receipt, and in such a case, it is necessary to take care that injustice is not done to the Defendant, by holding him to an arrangement, from which, as to this sum, at least, the Plaintiffs are released.

It was argued, that the sum in question ought to be considered as entirely out of the agreement, and that the Plaintiffs' right to their share of it ought to be treated as an entirely independent demand; but it does not appear to me that I ought so to consider it. If this sum had been known to both parties, it would have been treated as an item in the partnership accounts. I may presume, that if, with the item in their view, they had been desirous to compromise the suit, the Plaintiffs would have desired, and the Defendant might have been willing to give, a larger sum than was actually paid to the Plaintiffs; but what sum would have been required or given it is impossible for me to know, or even to conjecture. Various motives which induced the parties to compromise in the state of things which they supposed to be true, might have operated differently, or with different force and effect, if the existence of this item had been known; and, giving to the Plaintiffs the benefit of the item in account, it appears to me just, that both parties should, as far as it is now practicable, be restored to the situation in which they were before the agreement which is thus disturbed was made. I am therefore of opinion, that an account of the partnership profits must

must be taken, in the manner asked by the alternative prayer of the bill, except as to the two years, in respect of which I do not understand that the Plaintiffs' claim to an account is established.

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v.
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PRICE *v.* BLAKEMORE.

July 26.

IN 1810 an estate, which for distinction may be called the *Eardiston estate*, stood limited to the use of Mr. *Edwards* for life, with remainder to trustees to secure a jointure to Mrs. *Edwards*, and to preserve contingent remainders, with remainder to their issue in tail male. There was a power for the trustees, with the consent in writing of Mr. *Edwards*, to sell the property, and with all convenient speed, to invest the produce in the purchase of other fee simple hereditaments, to be settled to the same uses.

Trustees, with the consent of *A. B.*, the tenant for life, had power to sell the trust estate, and invest the produce in other real estate. In 1810, *A. B.*, with the concurrence of the trustees, sold the estate for 8440*l.*, and received the purchase money. About the same time (but whether with the concurrence of the trustees was not proved), *A. B.* purchased another estate for 17,400*l.*

In *May* 1810, Mr. *Edwards*, with the sanction of the trustees, but in his own name, entered into a contract for the sale of the trust estate to Mr. *Kenyon* for 8440*l.* In *September* in the same year, he entered into a contract with Mr. *Bishton*, for the purchase of another estate called the *Hampton Hall estate* for 17,400*l.*, but there was no evidence of his having done so with the sanction of the trustees. On the 7th of *May* 1811, Mr. *Kenyon* Of the 8440*l.*

8124*l.* was paid by *A. B.* in part payment for the second estate; the remainder was paid partly out of *A. B.*'s monies, and partly by money raised by a mortgage of the estate. The estate was conveyed to *A. B.* in fee. No acknowledgment or declaration of trust was ever made by *A. B.*, and he retained possession of the estate till thirty years after, when he became bankrupt. The Court, against *A. B.*'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, and held that there had been no such adverse possession, and no such acquiescence on the part of the trustees, as to preclude the Court making a declaration that they had a lien on the estate to the extent of the trust monies invested in its purchase.

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*Kenyon* paid 7000*l.*, part of his purchase money, to Mr. *Edwards* by cheque, which cheque, together with 300*l.* cash, belonging to Mr. *Edwards*, was, on the next day, paid over by Mr. *Edwards* to Mr. *Bishion*, in part payment of the purchase money for the *Hampton Hall* estate. A further sum of 1123*l.*, received by Mr. *Edwards* from Mr. *Kenyon*, was proved to have been paid by him to Mr. *Bishion* in *December*, so that of the whole money derived from the sale of the trust estate (8123*l.*) was traced into the *Hampton Hall* estate. The trustees executed a conveyance to Mr. *Kenyon*, and gave a receipt for the purchase money, the whole of which was received by Mr. *Edwards*.

A suit for specific performance was afterwards instituted by Mr. *Bishion* against Mr. *Edwards*; and he having borrowed 5000*l.* to enable him to perfect the purchase, the *Hampton Hall* estate was, in *January* 1818, *conveyed to Mr. Edwards in fee*, who immediately mortgaged it by demise to secure the 5000*l.* *Edwards* paid the remainder of the purchase money, and afterwards charged the estate with the payment of 1900*l.* to Mr. *Wace*. No acknowledgment or declaration of trust was ever executed by *Edwards*, shewing that the *Hampton Hall* estate was purchased with the trust property.

Mr. *Edwards* remained in possession till *May* 1841, when he became a bankrupt, and the estate was claimed by his assignees. This bill was filed by the surviving trustee, to establish a lien on the *Hampton Hall* estate, to the extent of the trust money employed in its purchase.

Mr. *Pemberton Leigh* and Mr. *Glasse*, for the Plaintiff. It is clear that *Edwards* acted as the agent of the trustees,

trustees, both in the sale of the one estate, and the purchase of the other. The trust money is traced into the *Hampton Hall* estate, which, though conveyed to him in fee, was still, to the extent of the trust money, held by him for the benefit of the trust.

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**Mr. G. Turner** and **Mr. Piggott**, for the assignees. The object of this suit is to enforce, against the assignees of the legal owner in fee, a lien which, it is alleged, arose so long back as the year 1810, no admission or recognition of the title in the meantime being proved. After such a lapse of time and such laches, this Court would not interfere in enforcing the right, even if it were proved to have originally existed. In *Bonney v. Ridgard* (*a*), which was a suit to set aside a fraudulent purchase from an executor, though the Court thought the Plaintiff would be entitled to relief, if the suit had been brought within proper time, yet the bill was dismissed, solely on the ground of the delay.

If the case be put on there being a trust, then it is merely a constructive trust, which will be barred by time. In *Beckford v. Wade* (*b*), Sir William Grant said (*c*), "As our statute bars only legal remedies, of course it has no direct operation upon trusts, for which there was no remedy but in Courts of Equity. But Courts of Equity, by their own rules, independently of any Statutes of Limitation, give great effect to length of time; and they refer frequently to the Statutes of Limitation, for no other purpose than as furnishing a convenient measure, for the length of time that ought to operate as a bar, in equity, of any particular demand.

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(*a*) 1 *Cox*, 145.

(*c*) Page 96.

(*b*) 17 *Ves. 87*.

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“ It is certainly true, that no time bars a direct trust as between *cestui que trust* and trustee ; but if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be ; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party, who, after long acquiescence, comes into a Court of Equity to seek that relief.”

Supposing, however, that the lapse of time is no bar, then the Plaintiff must adduce clear proof, first, that the produce of the trust estate was invested in the *Hampton Hall* estate : and, secondly, that it was so invested *on account of the trust*. We admit that to the extent of 7000*l.*, the produce of the *Eardiston* estate, was laid out in the purchase of the *Hampton Hall* estate ; but there is not a tittle of proof, that Mr. *Edwards* acted as the agent of the trustees, or that the money was invested *on account of the trust*, or how the money happened to come into his hands. In favour of the legal title, it must be assumed, after the lapse of thirty-one years, that the money was placed in his hands by the trustees, and that he was liable as on a loan, or as agent. No authority of the trustees being shewn for its re-investment in this estate, he must be considered liable only for the money, and the remedy against him is therefore barred.

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The Plaintiff has no lien upon the estate. In *Newcomb v. Burdon* (*a*), *A.* tenant for life, with remainder to *B.* in tail, by fraud, got *B.*'s authority to levy a fine; he sold the land, and invested the purchase money in the funds, where it was clearly identified. It was held that *B.* had no lien on this money against the other creditors of *A.*; and *Wilson v. Foreman* (*b*), as explained in 10 *Ves.* 519., affords no sanction for a contrary doctrine.

The estate was conveyed to Mr. *Edwards* absolutely; until his bankruptcy, he dealt with it as the absolute owner, both by mortgaging and charging it. It would not have been a due execution of the power to have purchased an equity of redemption, or an estate of which the tenant for life was absolutely entitled to an undivided portion.

The trustees concurred, and therefore have no right to come into equity, to have a breach of trust for which they are liable repaired by other parties.

Having regard to the long undisputed possession, the length of time, the laches, and the absence of proof of the material facts, the Plaintiff must come in under the bankruptcy.

Mr. *Parry*, for the infant tenant in tail.

Mr. *Kindersley*, Mr. *Kenyon*, and Mr. *Craig*, for other parties.

Mr. *Pemberton Leigh*, in reply. A tenant for life, as the agent for the trustees, sells the trust estate, and, the day after the receipt of the purchase-money, it is handed over

(*a*) 2 *Anstr.* 543.

(*b*) 2 *Dickens*, 593.

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over in payment for another estate. Can there be any reasonable doubt that he acted as the agent of the trustees in the purchase, or that the estate was purchased on account of the trust and in execution of the power?

This case cannot be affected by the length of time. There has been no adverse possession: the tenant for life was during his life entitled to the possession of the substituted estate; his enjoyment has been rightful in pursuance of the trust, and not adverse.

Trust money may always be followed; and in *Small v. Attwood* (a) money was followed into an investment, under much slighter circumstances than in the present case. It was wrong in conveying to *Edwards* in ~~fee~~; but it would not have been right to have conveyed the estate to the trustees, because *Edwards*, to the extent of the money contributed by him, had a lien ~~on~~ the estate.

*The MASTER of the ROLLS.*

It appears to me that the assignees were perfectly right in having this matter investigated, and they would not have performed their duty, if they had not done so; but, upon investigation, the case does not seem to be attended with any difficulty.

The estate was vested in the trustees of the settlement; and the Plaintiff was one of those trustees for the benefit of a married woman and other parties. There was a power of sale, to be exercised only with the consent of the tenant for life; and there was a direction that the purchase-money should be laid out in the purchase of other lands, to be settled to similar uses; it was on

(a) *Younge*, 507.

only, therefore, for the purpose of re-investment that the power of sale was to be exercised.

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The simple facts are these, there was an authority given by the trustees to Mr. *Edwards* to sell the trust estate, and it was accordingly sold for 8440*l.* in the year 1810. The purchase-money was received by Mr. *Edwards*, and it clearly appears that in this part of the transaction, namely, in the receipt of the purchase-money, Mr. *Edwards* was the agent of the trustees. He did not, it appears, pay over the purchase-money to the trustees. His assignees now request me to assume, that this was a simple loan of the money by the trustees to Mr. *Edwards*, and that the trustees had nothing but his personal security for replacing it; but it is in no way shewn, that the money was left in the hands of Mr. *Edwards* as a simple loan to him. Contemporaneously with the sale of the trust estate to Mr. *Kenyon*, there was a purchase of the *Hampton Hall* estate by Mr. *Edwards* from Mr. *Bishton* for 17,400*l.* Of the sum of 8440*l.* received for the purchase-money of the trust estate, a sum of 7000*l.* was, on the very day after, and by the very cheque for 7000*l.* received from *Kenyon*, handed over to *Bishton* in part payment of the 17,400*l.* If the Court was ever justified in acting on a presumption, it must, in this case, presume, that it was for the purpose of investment in the *Hampton Hall* estate that the *Eardiston* estate was sold. Considering the trusts, the person employed, the contemporaneous purchase, and the application of the portion of the purchase-money, nobody can believe otherwise than that this was one transaction, a sale of the trust estate, and a re-investment of this part of the produce at least in another. In the course of a few months 2000*l.* more was paid by Mr. *Kenyon*, of which 1123*l.* 19*s.* was paid over to *Bishton*, so that the whole purchase-money

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of 8440*l.*, except about 316*l.*, is proved to have been applied in the purchase of the *Hampton Hall* estate. The whole of the purchase-money for that estate was not paid until some time after, in *January 1818*, there having been, as I understand, a suit instituted in which *Edwards* was called upon specifically to perform the agreement, and for that purpose it became necessary to borrow 5000*l.* What happened then was extremely wrong; the conveyance was taken to *Edwards* in fee, and this was done, without any thing to shew that any part of the purchase-money had arisen from the sale of the trust property, and not only was that fact not noticed in the conveyance, but there does not appear to have been any other deed executed.

Edwards entered into possession, without having made any acknowledgment that he held on any trust. It is to be observed that, he being one of the *cestuis que trust*, and entitled for life to the income of the trust property, there was no adverse title ever brought in question between these parties, no pretence that *Edwards* was entitled to hold this property as against the trustees; but being entitled as tenant for life, he remained in the apparent enjoyment of his life interest, and the question of a possession inconsistent with his title under the deed was never contemplated.

This differs from the cases where, by the acquiescence of the trustees, the right of redress becomes lost. *Edwards* was not performing his duty in taking the estate in the way he did, but there is not the slightest thing to shew that the trustees were cognizant of what had taken place or in any way acquiesced therein. If there had been the slightest ground for the supposition, I must assume that the assignees would have filed their cross bill, and have brought the matter before the Court.

I cannot

I cannot suppose that there are any such grounds, the assignees not having filed a cross bill to establish their case.

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I think, therefore, there is no objection arising from any length of time which has elapsed:—that 812*sl.* 19*s.* of the produce of the trust estate has been traced into the *Hampton Hall* estate, and that to this extent the Plaintiff is entitled to a declaration that he has a lien on the estate.

OLDFIELD *v.* COBBETT.

July 28.

IN May 1843, the Defendant *Cobbett*, the executor of his father, whose estate had been administered in this Court, brought three further actions against the Plaintiff, who had in this suit been found to be a creditor of the estate. The Court, upon the affidavits, considered that, substantially, those actions had been brought to recover property belonging to the testator.

Mr. *Parker* moved for an injunction to restrain the Defendant prosecuting the actions.

After an estate has been fully administered in this Court, the executor will not be permitted without the leave of the Court, to prosecute an action to recover part of the testator's property from a party to the suit.

The Defendant, in person, *contra*.

The MASTER of the ROLLS.

Whether there are merits or not in this case, I certainly am not in a situation to determine, but I can determine this, that after the estate of the testator has been fully administered in this Court, and every opportunity given to the Defendant, the executor, to examine

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 v.  
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v.

BLAKEMORE.

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*The MASTER of the ROLLS.*

Whether there are merits or not in this case, I certainly am not in a situation to determine, but I can determine this, that after the estate of the testator has been fully administered in this Court, and every opportunity given to the Defendant, the executor, to examine

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every charge on the estate, and every particular constituting the estate, he cannot be permitted, without the leave of the Court, to commence an action to recover from the Plaintiff a portion of the testator's property.

Where parties conduct their own cause, one misfortune is, that they do not understand where the stress of the case is, and the consequence is, that the time of the Court is occupied in discussing that which is quite immaterial. It has been supposed that the order for a receiver, and the order to restrain the executor from getting in the estate, was the foundation for the order restraining the former action (*a*), but this really formed no part of the consideration.

Under the present circumstances I must grant the injunction. It appears to me that these actions are substantially brought to recover property belonging to the testator, after the estate has been administered in this Court; this cannot be allowed without the leave of the Court. If there is any ground to justify the proceedings at law, it is open to Mr. *Cobbett* to make a proper application for leave, and then it will be seen whether there has been any such omission in the former proceedings, as to make it proper to commence fresh litigation.

Taking the matter as it now stands, and it appearing that the estate has been administered, and that three actions have been brought by the executor against the Plaintiff without the leave of the Court, I think it proper that they should be stayed. I must grant the application with costs.

(*a*) 5 *Beavan*, 132.

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See *Frank v. Basnett*, 2 *Myl. & K.* 618.

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## GUIDICI v. KINTON.

*July 19.  
August 7.*

THE facts of this case sufficiently appear in the judgment.

Mr. Turner and Mr. Haig, for the Plaintiff, cited *Shepherd v. Towgood.* (a)

Mr. Pemberton Leigh, Mr. Kindersley, and Mr. Dixon, for the Defendant.

*The MASTER of the ROLLS reserved his judgment.*

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*The MASTER of the ROLLS.*

This bill is filed by *Gaetano Guidici*, one of the *Italian* executors of the late *Mrs. Cosway*, against *Newbold Kinton*, the executor of the same testatrix in *England*, and it prays, that the Defendant may account for all such parts of the personal estate of the testatrix, as was situate in the United Kingdom of *Great Britain and Ireland*, at the time of her death, and may be charged with the loss occasioned by the investment of 7200*l.* in Bank stock, and with interest upon such sums of money as should appear to have been lent by him at interest, or improperly retained in his hands.

After some objections, to the constitution of the suit and to the representation which had been taken out to *Mrs. Cosway*, had been taken, it appeared to me, that if there

Under a decree in a legatee's suit to take the usual accounts, *A. B.* went in and claimed the residue, which the Master found him entitled to; but the residue was not then ascertained, and no order was made in respect of it. Held that *A. B.* was not precluded from afterwards asking relief against the executor, in respect of an alleged breach of trust, in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the executor, or to claim the relief which he asked in the second.

(a) *Turn. & Russ.* 379.

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there was no other objection, the Defendant was bound to account to the Plaintiff in this suit for the *English* personal estate of Mrs. *Cosway* possessed by him. It was then shewn by the Plaintiff, that a part of the *English* personal estate of Mrs. *Cosway* consisted of 5000*l.* Bank stock; that on the 17th of *April* 1828, the Defendant, having no immediate occasion for money for the purposes of the testatrix's estate, sold that Bank stock for 10,268*l.*; that on the same day, he lent 10,000*l.*, part of the purchase-money, to Messrs. *Hulberts* and Co.; that the money was repaid by them, at various times between the time when it was lent and the month of *February* 1839; and that on the 26th of *February* 1839, the Defendant reinvested the sum of 7200*l.* in the purchase of 3500*l.* Bank stock. The Defendant received the sum of 21*3l. 4s. 1d.* for interest on the loan to Messrs. *Hulberts* and Co., and now offers to allow that sum to be paid to the Plaintiff, but the Plaintiff claims to be entitled to charge the Defendant with so much Bank 3 per cent. annuities, as might have been purchased with the 7200*l.* at the time when that sum was invested in Bank stock, and with interest at 5 per cent. upon the money which he lent to Messrs. *Hulberts* and Co. I am of opinion that he is entitled to some relief upon this transaction, if he be not precluded from asking any relief, in consequence of the proceedings in a former cause of *Prodon v. Kinton*.

As to this, the case is, that in the month of *August* 1839, *Annette Prodon*, a legatee of 1000*l.* under the will of Mrs. *Cosway*, filed her bill for an account of what was due to her upon her legacy, and for payment, or that the usual accounts might be taken. The Defendant answered that bill, and by an order dated the 25th day of *March* 1840, it was referred to the Master to take an account of the personal estate of the testatrix come to the

the hands of Mr. *Kinton*, and also an account of the debts, funeral expenses, and legacies of the testatrix.

Under this order, and on the 15th of *July* 1840, *Gaetano Guidici*, the Plaintiff in the present suit, claimed to be a creditor of the testatrix to the amount of 4000*l.*, with interest thereon from the day of the death of the testatrix, and this claim was allowed by the Master, and stated in his report, dated the 3d of *February* 1841. Under the same order, *Guidici*, by another state of facts, claimed to be entitled, as specific legatee, to receive, on trusts created by the testatrix, *the entire residue* of her personal estate and effects in *England*, and by the same report, the Master found him to be entitled, as specific legatee, to a sum of 2800*l.* 3 per cent. consolidated Bank annuities, or the residue thereof then remaining in the hands of the trustees of an indenture of the 11th of *July* 1832, and to the clear residue of the testatrix's estate and effects in *England*.

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The Defendant took exceptions to the report, and *Guidici* and his two co-trustees presented a petition for payment of the debt of 4000*l.* and interest, and the case coming on to be heard, upon the report, the exceptions and the petition, on the 26th of *April* 1841, it was ordered that the exceptions should be overruled, that the debt claimed by *Guidici* and his co-trustees should be paid to them, and that the legacy and interest found due to *Annette Prodon* should be paid to her. The Master was not directed to state what was the residue of the testatrix's estate, and no report or order was made in respect thereof.

I have read all the proceedings in the Master's office with which I have been furnished, and I am of opinion, that *Guidici* was not, in the cause of *Prodon v. Kinton*,

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in a situation which enabled him to investigate the accounts of Mr. *Kinton*, or to claim the relief which he now asks, and that he is not precluded from asking the relief in a suit of his own.

From some difficulty, which there may have been, in determining what, under a proper construction of the testamentary papers, ought to have been done with the Bank stock, and from some evidence which is given that the Defendant acted under legal advice in reinvesting the 7200*l.* in Bank stock, I think that I ought not to charge him with interest at 5 per cent. upon so much of the 10,268*l.* purchase-money as remained unapplied for the purposes of the will, from the time when the Bank stock was sold, down to the 26th of *February* 1839; and that the account of the estate must be taken, with a declaration to that effect, and leave for the Master, if he shall think fit, to adopt the accounts in *Prodov v. Kinton*.

As the whole question raised in this cause has been occasioned by the sale of the Bank stock, when the proceeds were not required for the purposes of the estate, I think that *Kinton* must pay the costs of this suit up to and including the hearing of this cause.

And whatever may be found due, in respect of the residue, should be paid into Court to the credit of this cause, with liberty to apply.

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HOLMES v. BADDELEY.

July 27.

THE Plaintiff and the Defendants claimed an estate, *A* and *B*. adversely, as heirs at law *ex parte paterna* of *Susannah Holmes*, the younger, who died in 1898, the Defendants alleging that the Plaintiff was illegitimate.

The estate was also claimed by *Mrs. Hemming*, as heir *ex parte materna*.

In 1839, the Plaintiff entered into a compromise of his claim with the Defendants, by which the produce of the estate was to be divided between them in certain proportions, and in 1842, the Plaintiff, alleging that the transaction was tainted with fraud and misrepresentation, filed this bill to set it aside.

The Defendants, by their answer, stated the claims of the heir *ex parte materna*, and that in 1841, the legal estate in the property had improperly been conveyed to *Elworthy*, upon some trusts for the benefit of the Plaintiff and *Mrs. Hemming*, and to give effect to some compromise between them, to share the proceeds of the estate; and they stated as follows:—“And the Defendants believe this suit to be instituted and carried on, not only for the benefit of the said Complainant, but for the benefit, and in concert with the said *Mrs. Hemming*, as well as the said *Elworthy*.”

The Defendants admitted “that they had in their possession or power, certain letters and copies of letters between *C.* and *B.* in concert with *C.* Held, that this did not relieve *B.* from the obligation to produce the cases.

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between their solicitors, as such solicitors, and various persons, of various dates subsequent to *August 1838*, and a case marked with the letter (A.), on the behalf of the Defendants, laid before counsel in the month of *November 1838*, with his opinion thereon, and another case marked with the letter (B.), on behalf of the Defendants, laid before counsel in the month of *January 1839*, with his opinion thereon, which cases were laid before counsel, and all of which letters were written and sent, after the Defendants were aware that a claim to the said estates, adverse to the title of the said Defendants, was about to be made on the part of the alleged heir to *Susannah Holmes* the younger, *ex parte materna*, and in contemplation of legal proceedings being taken by the said Defendants to enforce such title, and the greater number thereof, after the said claim had actually been made on the part of *Mrs. Hemming*, and occasioned by, and with reference to such claim, and with reference to the right and title of the said Defendants in issue in this cause, and was wholly independent of the compromise by the said Complainant's said bill sought to be set aside, and without any reference thereto. They said, that they were advised, and insisted, that all the said documents and the said two cases and opinions, and all the said letters and copies of letters were privileged communications, and that they were not bound to produce the same, or make any discovery in relation thereto."

A motion was now made for the production of these documents.

Mr. *Pemberton Leigh*, Mr. *G. Turner*, and Mr. *Bird*, in support of the motion.

Mr. *Kindersley* and Mr. *G. Russell*, *contra*.

Mr.

Mr. *Pemberton Leigh* in reply.

Curling v. Perring (a), Storey v. Lord George Lennox (b), Herring v. Clobery (c), and Cholmondeley v. Clinton (d), were cited.

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*The MASTER of the ROLLS.*

The question in this case is, whether the documents referred to ought to be produced. The bill is filed by a person who claims to be heir at law of *Susannah Holmes, ex parte paterna*, and unless he makes out his claim in that character, the suit cannot be maintained. Having filed his bill to set aside a deed of compromise, he moves on the answer that certain documents in the Defendants' possession may be produced. It appears that the Defendants in this case, are persons who also claim to be heirs at law of *Susannah Holmes, ex parte paterna*, so far, therefore as the question whether the heirs *ex parte paterna* or *materna* ought to prevail, the Plaintiff and Defendants have similar interests. So far from any thing adverse, they have precisely the same interest, and no question is raised in this case by the Plaintiff as to any right *ex parte materna*. Sometime after the death of the party in possession, claims *ex parte materna* were made, and the Defendants, claiming as heirs *ex parte paterna*, found it necessary to prepare to defend their right as heirs *ex parte paterna*, against the claim of the heirs *ex parte materna*. The contest on this occasion is as to the production of the documents which arose in consequence. The Defendants state in their answer that the cases were laid before counsel, and the letters were written and sent after they were aware "that a claim to

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(a) 2 *Myl. & K.* 380.

(b) 1 *Myl. & Cr.* 525.

(c) 1 *Phillips*, 91.

(d) *Turn. & Russ.* p. 116.;

and see *Jones v. Pugh*, 1 *Phillips*,

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the said estates adverse to their title was about to be made on the part of the alleged heir to the said *Susannah Holmes* the younger, *ex parte materna*, and in contemplation of legal proceedings being taken by the Defendants to enforce such title, and the greater number thereof after the said claim had actually been made on the part of Mrs. *Hemming*, and occasioned by and with reference to such claim, and with reference to the right and title of these Defendants in issue in this cause, and the said cross cause, by the said Defendants instituted as aforesaid, and was wholly independent of the compromise by the said Complainant's said bill sought to be set aside, and without any reference thereto."

If it be true that the right of the Defendants as heirs *ex parte paterna* was in question between them and those claiming *ex parte materna*, the issue in this cause is something quite different from that which was then in question. Taking the record as it stands, the Plaintiff in this suit must stand or fall by establishing that he is heir *ex parte paterna*, there is nothing now in controversy between these parties which was then in issue. It is clear, that these documents originated before the suit between the Plaintiff and Defendants in this case arose or was in contemplation, it does not therefore appear to me that the Defendants are entitled to the protection which they have asked.

It is said that the letters passed between the Defendants and their solicitors, but the right to protection on that account fails on the words in the answer.

It is then contended that this bill, though the suit of the Plaintiff, is in effect, in some way or other, the suit of Mrs. *Hemming*, and that although the Plaintiff has so framed his bill as to stand or fall by his title of heir *ex parte*

*parte paterna*, yet that some arrangement has been made by the Plaintiff with the person claiming as heir *ex parte materna*, and that the Plaintiff is carrying on the suit in concert with her and for her benefit, and that as she would not have a right to production, therefore the Plaintiff ought not. I do not recollect having such a case as this attempted before.

It is also said that the Plaintiff having got a discovery might dismiss the bill, and then Mrs. *Hemming* might file a bill of her own and use the discovery obtained in this suit. I am of opinion, that speculations of this sort ought not to affect the rights of parties on the record. There is no possibility of knowing what may be the consequence of the production of documents which the Plaintiff in a cause may obtain. This Court cannot act on such speculations. I must look at this record as constructed in a particular form, and not speculate on the use which may be made of the discovery when obtained,

I think that the Plaintiff is entitled to the production of the letters and cases.

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NOTE.—On appeal to the Lord Chancellor, this case was reversed on the 25th of November 1844.

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Jan. 18, 20, 21. The ATTORNEY-GENERAL v. The GROCERS
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(*Laxton's Charity.*)

A testator by his will founded a charity, towards which he directed certain and definite sums to be applied, and he devised estates to a company for that purpose. The will contained no express beneficial gift to the company. Held, however, under the circumstances, that the company was entitled to the increased rents of the property after making the fixed payments.

THIS information was filed by the Attorney-General, at the relation of several of the inhabitants of *Oundle*, and it sought to have the whole increased rents of property devised to the Grocers' Company, applied to the charitable purposes stated in the testator's will.

Sir *W. Laxton* by his will, dated the 17th of *July* 1556, after giving certain pecuniary legacies, devised as follows: — “The residue of all my manors, lands,” &c., “I leave to descend, after the decease of Dame *Johane* my wife, to my cousin *Johane Wanton*, my right heir, and her heirs for ever, according to the order of the King and Queen's Majesties' lawes;” and he appointed his wife to be sole executrix of his will, and certain persons therein named to be overseers, who were to assist her.

On the 22d of *July* 1556, the testator made a codicil, which was as follows: — After reciting that “he was fully minded to erect and found a free grammar school at *Oundle*, in the county of *Northampton*, to have continuance for ever, to be kept in the messuage, late called the *Guyld* or *Fraternity House* of *Oundle* aforesaid, which free school he willed, should be called The Free Grammar School of him, Sir *Willam Laxton*, Knight, Alderman of *London*.” And further reciting, “that his mind, will, and intent was, that the schoolmaster of the said free school, for the time being, should have for his stipend and wages yearly, 18*l.*, and the usher of the said school, yearly, 6*l.* 13*s.* 4*d.* And that his whole mind

mind and intent was, to have seven poor men perpetually to be found at *Oundle* aforesaid, and to have each of them 8*d.* weekly, towards their maintenance and relief, and also convenient lodging and free house-room and dwelling in the said messuage or tenement, then of late called Guyld or Fraternity House of *Oundle*. And that for the said Godly intent and purpose, *he had taken order, and that it was agreed* between him and the Wardens of the Commonalty of the Mystery of the Grocers within the city of *London*; and that he had set out unto them, in particular, certain of his lands and tenements within the city of *London*, as well for the payment of the stipends aforesaid, appointed to the said schoolmaster and usher, and for the poor men, as also for the reparation and maintenance of the said messuage or tenement, then of late called the Guyld or Fraternity House of *Oundle*; and that he, minding the accomplishment of all the premises, and to have the same take effect according to his full mind and intent, did, by his said codicil, will, devise, give, and bequeath unto the Defendants, the Wardens and Commonalty of the Mystery of the Grocers within the city of *London*, and to their successors for ever," certain messuages, lands, tenements, &c., in his codicil specified: "to hold the same unto them and their successors for ever, *upon this condition and intent* thereinafter expressed and declared; that is to say, that the said Wardens and Commonalty, within as convenient time as they might or could, should make suit with his executors to the King and Queen's Majesties, to obtain at their Highnesses' hands, the said messuage or tenement, then of late called the Guyld or Fraternity House of *Oundle* aforesaid; and the said messuage or tenement being obtained, he willed the same to be employed and used for the school-house aforesaid, and for the habitation of the said seven poor men." And he also willed that the Grocers' Company should,

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should, from time to time, for ever more, provide a schoolmaster and usher, and should yearly pay the schoolmaster "out of the issues, rents, and reversions of the messuage, lands, and tenements aforesaid to them bequeathed, for his stipend and wages yearly, 18*l.*, and to the usher 6*l.* 18*s.* 4*d.*" And he also willed them, with the advice and consent of the Vicar, &c. of *Oundle*, to appoint seven poor men to be bedesmen for him, the said Sir *William Laxton*, in the said messuage, to have their convenient lodging and dwelling therein freely, and that the said Company should, yearly, pay, "out of the issues and revenues of the foresaid lands and tenements," to every one of the said poor men 3*s.*, which amounted weekly at the rate of 8*d.* a piece;" and he further willed, that the Grocers' Company should, yearly, pay unto the Vicar, &c. of *Oundle*, 24*s.*, to be employed in the reparation and maintenance of the said free school; and he further willed, that the said free school, schoolmaster, usher, and bedesmen should perpetually be named and called the free school, &c. of Sir *William Laxton*.

And he willed, "that for lack of convenient time further to explain and set out the erection aforesaid, that all other things necessarily touching the erection and continuance of the said free school, and other the premises, should be considered and done in such godly sort, as by the good discretion of his executrix and overseers of his last will and testament, or by their learned counsel, should be thought meet and convenient."

The testator died shortly after (a), and his will was proved by his widow on the 28th of *August* 1556. The  
Company

(a) 25th *July* 1556.

Company accepted the property, and the Guild having in some way which did not appear been obtained, they proceeded to establish the charity, after some disputes and litigation with the widow and the heir at law. The particulars as to which appeared only from the following entries in the Defendants' books.

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16th November 1556. — “Mr. Alderman *Lodge* declared at this court, that Sir *William Laxton*, Knight, did will, by his last will and testament, certain lands in *London* to this Company, for the founding of a free school and maintaining of certain poor persons, as by his will may appear; whereunto, the whole assistants are well willing to receive the same, with thanksgiving for his genteel remembrance.”

7th December 1556. — “It is agreed, that Mr. Wardens shall betake a copy of Sir *William Laxton*'s will, so much as shall concern and belong to the erection and finding of a free school as he has devised, and also that the said Mr. Wardens shall view the lands given for the same, and to know what years is granted of the same lands, and when the same shall be expired.”

23d December 1556. — “Whereas Sir *William Laxton*, Knight, deceased, by his last will and testament, devised certain lands and tenements within the city of *London*, for the erection of a free school and maintenance of certain poor persons in *Oundle*, in the county of *Northampton*, and further willed that this Company should have the order, rule, and disposition thereof, and forasmuch as it has been sundry times moved to this house, whether they would take upon them to have the said lands to the intent aforesaid or not; at this court, the whole assistants, with thanksgiving, is well willing, pleased, and contented to receive the same, and

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thereupon have appointed Mr. Wardens, Mr. *Tathill*, and Mr. *Grafton*, to speak with Mr. *Southcott* to travaile with them, in drawing a plot and form in what manner the same may be done, and that finished, to certify the house thereof at the next court."

17th *May* 1557. — "At this court there was a letter sent from the Earl of *Bedford* to this Company, which read, the effect was, that this Company should further the legacy of Mr. *Laxton* for the erection of a free school at *Oundle*, in *Northamptonshire*; whereupon it is agreed it shall be moved at the next court."

6th *July* 1557. — "It is also agreed that Mr. Wardens, Mr. *Mills*, and Mr. *Grafton* shall travaile with Mr. *Southcott*, for a draft to be made of the free school at *Oundle*, of the late gift of Sir *William Laxton*, Knight, deceased; and all such money as Mr. Wardens shall lay out for the same, or for any thing thereunto appertaining, shall be of the common goods of this house, and this court be a sufficient warranty for them."

12th *November* 1557. — "At this Court, Mr. Alderman *Lodge*, in open Court, did declare, that the Lady *Laxton* is minded to make assurance to this Company of all such lands as Sir *William Laxton*, by his last will and testament, did give to this Company after her decease, to the intent and upon condition, that the said Wardens should employ the same to such uses and purposes as he in his last will and testament hath declared; at which Court Mr. *Southcott* was required to know, what assurance was necessary for the Company, who declared that the will of Sir *William Laxton*, being inrolled in the hustings of *London*, shall be sufficient assurance to this Company; yet the said Mr. *Southcott* thought it necessary

cessary to have a release from Mr. *Wanton* and his wife, to put all things out of doubt; whereupon, Mr. *Wanton* being then present, was required to do the same, who answered that for his part he would never desire that good work which Mr. *Laxton* had devised should be done, notwithstanding he would that his heirs would take such benefit as the law will give them, if

Company should chance to break the said Mr. *Wanton's* will; and thereupon the said Mr. *Wanton* desired that Mr. *Southcott* and Mr. *Gilbert* might talk *rein.*"

**1st March 1558.**—“It is agreed that Mr. *Wardens*, Mr. *Grafton*, and Mr. *Ramsey* shall commune and talk with Mr. *Thomas Wanton* and his wife, for and about a release, from them twain, of Mr. *Laxton's* lands, which he gave to this Company for finding and maintaining of a school at *Oundle* in *Northamptonshire*; and they, the persons aforesaid, to require Mr. *Recorder* and an Alderman to go to Mr. *Wanton* for to take knowledge of the said release.”

**9th October 1560.**—“Whereas Mr. *Thomas Lodge*, Alderman, declared, at a court of assistants holden on the 16th day of *November* 1556, that Sir *William Laxton*, Knight and alderman of *London*, did give and bequeath to this Company, by his last will and testament, certain lands and tenements in *London*, for finding of a free school and poor men at *Oundle* in *Northamptonshire*; and thereupon, the whole court at that time received the same with thanksgiving, and now, at this court, the said gift concerning the” [here was a short obliteration in the entry] “was revived and had in memory, wherefore the assistants above written are and will be well willing to receive the same lands so bequeathed, and so to per-

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form the will of the said Sir *William Laxton*. And furthermore it was agreed that Mr. Wardens shall retain counsel learned in the laws of this realm, to have an assurance from the Lady *Laxton*, widow, late wife of the same Sir *William Laxton*, for to convey the interest of the same lands to this Company."

14th October 1566.—“Item, — Touching Sir *W. Laxton*’s will, Mr. Wardens are requested to speak with the Lady *Laxton* and to know her pleasure therein, which they have promised to do.”

11th August 1570.—“Item, — A motion was made now touching Sir *William Laxton*’s will for the school house at *Oundle*, but the taking any order therein was deferred until another time.”

27th July 1571.—“Touching Sir *W. Laxton*’s good devise for the maintenance of a free school and other things, communication was now had, and in the end, Mr. Wardens were called to take pains therein, and to take good counsel, what ways were left to bring the same to good effect; and such charges as shall arise about the same, to be borne of the goods of this house, and their order to be a discharge sufficient for the same.”

1571.—It appeared, from a bill of costs, that in this year, counsel’s opinion was taken, “touching the force of the codicil, which he said was as good as any part of the will;” and that the Company exhibited their bill in Chancery against Lady *Laxton* and Mrs. *Wanion* respecting the devise, which was carried to a hearing. The pleadings in the suit were not, however, produced.

18th October 1572.—“ Communication was had concerning the free school at *Oundle*, which Sir *William Laxton* did, by his will, appoint to be erected and continued by this Company; and the matter between the *Wantons* and the Company being yesterday heard in the Court of Chancery, where the Lord Keeper took order, that Mr. Wardens shall speak with Mrs. *Wanton*, being next heir to Sir *William Laxton*, and propose to agree with her for some reasonable sum of money to clearly release her title, that she and her heirs may hereafter have in the lands appointed for the maintenance of the said school; whereupon, it was thought good, that Mr. *Warden Young*, Mr. *John Riche*, and Mr. *Richard Young* shall go to Mrs. *Wanton*, to speak with her, which was so done, and upon their answer, it was agreed, that her counsel and ours shall meet with Mr. Wardens this afternoon at the *Temple*, in Mr. Solicitor, his chambers, and there to have conference for an agreement. There was conference but no agreement.”

24th October 1572.—“ This Court was informed what had been done in the suit for the lands appointed for this Company for the maintenance of Sir *William Laxton*'s school in *Oundle*, which hath been a chargeable suit: and there was now read an order made by the Lord Keeper, wherein is included an offer made by Mrs. *Johane Wanton*, and also a dismission out of the Chancery. Whereupon, it was thought good to send to the Lady *Laxton* presently, to know her pleasure, whether she would be content to part from the houses for her lifetime, and to let the Company possess the same, that with the rents, they may erect and maintain the school, according to Sir *William Laxton*'s will; and there were now sent unto her Mr. *Alderman Boxe*, Mr. *Warden Young*, Mr. *Francis Bowyer*, Mr. *Richard Young*, and Mr. *Thomas Norton*, which brought word,

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that the said Lady *Laxton* is content to part from the said houses out of her hand, so that the Company will, with the rents of the same, perform and fulfil the will of the said Sir *William Laxton* touching the maintenance of the said free school and poor men at *Oundle*. And there were now requested to assist Mr. Wardens in the said business, Mr. Alderman *Boze*, Mr. *Richard Thornhill*, Mr. *Nicholas Backhouse*, and Mr. *William Owenshaw*."

19th December 1572. — "At the said Court, motion made, for the naming of certain persons of this Company to be feoffees of trust to receive the lands of the Lady *Laxton*, which Sir *William Laxton* bequeathed to them for the maintenance of a free school in *Oundle* in *Northamptonshire*, from the which lands the Lady *Laxton* is content presently to depart, having estate in the same for the term of her life. And it was agreed that Sir *J—— White* and others shall be feoffees to receive the said lands to the use aforesaid."

13th March 1572. — "At the aforesaid Court, motion was made, of request made by the Lady *Laxton*, to grant Sir *Thomas Lodge* a lease of a house, wherein he dwelleth in *Cornhill* for twenty-one years, upon consideration that she will presently release the lands to this Company for maintenance of a free school in *Oundle* in the county of *Northampton*, wherein she is entitled for the term of her life; and at this instant, came Sir *Thomas Lodge* himself and brought the book which was drawn between the said Lady *Laxton* and the Company, declaring that my Lady is content that the book shall pass, and that the Company shall, from the Annunciation of our Lady next, enjoy the lands appointed to them by the will of Sir *William Laxton*, and be charged, within as convenient time as the Company



pany may, to erect, establish, and maintain the said school and seven poor almsmen, and all other things, according to the tenor and true meaning of the same Sir *William Laxton* his will. And after he had delivered the said book, he declared, that forasmuch as he hath already received friendship at this Company's hands, he is ashamed to receive any thing of the same; nevertheless, if it would please them, at the request of the said Dame *Johane Laxton*, to grant him a lease of the house he dwelleth in, he would take it very thankfully at their hands, and think himself much bound to them for the good wills therein; whose suit being heard, and consideration thereof had, he was answered, that he needeth not to have any mistrust in the Company, for they do not mind to put him out of the house, though his lease was expired, and other answer they were not determined to make therein, and as for the book, they do agree and order that it shall be engrossed and sealed, and the Company, by the feoffees, seized of the lands, according to the tenor of the said book, that Mr. Wardens shall, as conveniently and as speedily as they can, settle the school and almsmen, in such order as is limited in the will of Sir *William Laxton*."

12th June 1573. — "First, at this Court, was read, the proceedings and order taken by Mr. Wardens at *Oyndle*, concerning the establishing of the school house, schoolmaster, usher, and seven poor men there, viz.: — Upon the 3d day of June last, possession was taken by Mr. *Owenshaw* and Mr. *Hawke*, being two of the feoffees thereunto appointed, of the school house, a house for the schoolmaster and another for the usher, according to a deed of feoffment made by Dame *Johane Laxton*, which was done in the presence of a great number of the town of *Oyndle*, both old and young; and there was given to forty-eight scholars a penny a

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piece, to the intent they should the better remember Mr. Wardens being at *Oundle* about the said possession. And there was also given to five poor women there, before now placed by the Lady *Laxton* and now removed to place men there, to each of them, twelve-pence."

The expences to which the Company were put about these matters were, apparently, paid by them out of their private monies.

When the Company took possession of the property in 1573, the rental amounted to about 50*l.* per annum. The sums specified in the testator's codicil amounted to 38*l.* which was paid by the Company, and the surplus, from the commencement of the charity, was retained by them. In 1577, *John Wanton* (who was assumed to be the then heir), made some claim to the property. He represented to the Company, that he was entitled, as his counsel did declare unto him, to the lands &c.; yet, to avoid suit in law, he proposed that four councillors, two to be chosen by each party, should declare their opinions on the same. What became of this claim did not appear, but in the following year (1578), the Company increased the salaries of the schoolmaster and usher by "benevolences" of 6*l.* 3*s.* 4*d.* and 3*l.* 6*s.* 8*d.* each respectively. The Company continued to receive the increased rents, and after making payments to the charity with some augmentation, retained the surplus.

At the great fire of *London* in 1606, this, together with other property of the Company, was destroyed, and they became considerably indebted.

By a decree of charitable uses issued under the 43 *Eliz. c. 4.*, after reciting an inquisition whereby the jurors



jurors found amongst others, the particulars of this property which was charged by Sir *William Laxton* with the charitable payments amounting to 38*l.*, and that the Company did think fit to augment during their pleasure (shewing the payments to amount to 102*l.* 16*s.*, and that they were willing in future to pay 82*l.* 16*s.*), and that their whole estate should be charged with the arrears of this and the other charities ; it was ordered, that all the real estate of the Company should stand charged with all the growing charitable uses and the arrears, and should be conveyed to trustees for that purpose, and in consideration of the impoverished state of the Company, twenty years was given them for the payment of the arrears.

Their whole estate, including that of Sir *William Laxton*, was accordingly conveyed to trustees to pay the charities mentioned in the schedule. In the schedule the rental of the *Laxton* estates then appeared to be 167*l.*, and the payments directed to be made were 82*l.* 16*s.* only.

The estate had since come back to the Company, and the gross rental had increased to 1500*l.* a year, and the Company had also a sum of 8645*l.* consols, which had arisen from the sale of part of the charity estate under the *London Bridge Act*.

Of the present income, the Company applied about 300*l.* a year only to the purposes of the charity, and retained the remainder.

This information sought a declaration that the whole income of the property was applicable to the purposes of the charity, and for a scheme, having a more extended system of education, under the 3 & 4 *Vict. c. 77.*

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The Defendants, by their answer, claimed to be entitled to appropriate the surplus income beyond the payments made by them, to their own use.

Mr. G. Turner and Mr. Collins in support of the information.

The rule of the Court, as laid down in *The Attorney-General v. The Drapers' Company* (a) in conformity with the prior decisions, is this, "that in every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances, from which a contrary intention of the testator can be collected." (a)

So in *The Attorney-General v. The Coopers' Company* (b), the rule is again thus stated, "that if the testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not, in specifically directing the application of portions of it, exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail; and on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time, to some charitable purposes, and by that means exhausts the whole, then, if the income should afterwards increase, the increase will also be applicable to charitable purposes."

The whole intention of the testator was charity, and there is not, upon the codicil, the slightest trace of an intention

(a) 2 *Beav.* p. 511.

(b) 5 *Beav.* p. 34.

intention to benefit the Grocers' Company. The testator says, he was "fully minded to erect and found a grammar school," and that the schoolmaster and usher should have a particular stipend, and his "whole mind and intent was to have seven poor men perpetually to be found" &c.; and he recited, that for the said godly intent, he had taken order and agreed with the Grocers' Company, and that he had set out unto them certain lands; but for what purpose? "As well for the payment of the stipends aforesaid appointed to the said schoolmaster and usher, and of the poor men, as also for the reparation and maintenance" of the Guild, and then he, "minding the accomplishment of all the premises, and to have the same take effect according to his full mind and intent," devises &c., to the Defendants upon condition and intent &c. In this there is no trace of any desire of giving a benefit to the Company, but merely an intention to provide for the maintenance, in perpetuity, of the different objects of his charity.

The words "upon condition and to the intent," import no beneficial gift, as in *The Attorney-General v. The Cordwainers' Company* (a), but a mere trust; for the payments were to be, "out of the rents and rever-
sions" of the premises, and not out of the Defendants' own revenues, and the words "upon condition" were used in *The Attorney-General v. The Coopers' Com-
pany* (b), and though there was a gift over, still the Court did not consider the Coopers' Company entitled to the whole increased rents.

The loss of the patronage of the school and charity, is a penalty sufficient to answer the "condition." The testator

(a) 3 *Myl. & K.* 534.

(b) 3 *Beav.* 30.

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testator authorises his executrix and overseers to do all things necessary "touching the erection and continuance of the said free school." Again; from the circumstances and especially the accounts, the reasonable presumption is, that the specified payments exhausted the whole income at the time.

The entries in the Defendants' books show no claim of any beneficial interest, but that they took the property merely for the purposes of the charity.

The decree did not, and could not alter the rights of the charity, which was not represented; the whole object of those proceedings was to give time for the payment of the arrears. The Commissioners had no authority to alter the foundation, and if the decree did make an alteration, it must now be reviewed. *The Attorney General v. The Grocers' Company (a), Hynshaw v. The Corporation of Morpeth (b).* Usage, however large, cannot alter the rights of the charity apparent on the codicil, for trustees cannot acquire a right against the charity by a continued wrongful application of charity property.

*The Attorney General v. Wilson (c), The Attorney General v. The Skinners' Company (d), The Attorney General v. The Painter Stainers' Company (e),* were also referred to during the argument.

Mr. Pemberton Leigh, Mr. Kindersley and Mr. Bacon, *contra.*

First, upon the codicil alone, there appears no devotion of the whole rents to the charity, but an intention that the specified fixed payments should be made. The devise

(a) 1 *Keen*, 506.

(c) 5 *Myl. & K.* 302.

(b) *Duke's Charitable Uses*,

(d) 2 *Russ.* 407.

242.

(e) 2 *Cox*, 51.

devise is not "in trust" as in *The Attorney General v. The Drapers' Company* (a), but "upon condition," an obligation was therefore imposed on the Grocers' Company to make the specified payments, and which was to be enforced by the "condition," rendering them liable to a forfeiture on the non-performance of the "mind, will, and intent" of the testator, to have the specified payments made to the several objects pointed out by him. In *The Attorney General v. The Cordwainers' Company* (b) a condition, giving over the property on non-performance of his will by making certain fixed payments, was considered as implying a benefit to the Cordwainers' Company, who were held entitled to the surplus. Sir John Leach, in giving judgment in that case says, "The imposition of a penalty for non-performance of the condition, implies a benefit if the condition be performed, and is inconsistent with any other intention, than that the testator meant to give a beneficial interest to the Company upon the terms of complying with the directions contained in his will. There is, therefore, no trust either express or implied for charitable purposes further than to the extent of the special charge imposed; and, upon all the principles applied in this court to such a case, this information must be dismissed." It does not appear that the fixed payments exhausted the whole rents, the surplus was therefore intended for the benefit of the Grocers' Company for their pains and trouble, and to whom nothing else was given by the will of the testator. *The Attorney General v. The Corporation of Bristol* (c), *The Attorney General v. Brazen Nose College* (d).

## Secondly.

(a) 2 *Beav.* 508.(d) 8 *Bl.* 377. 2 *Cl. & Fin.*(b) 3 *Myl. & K.* 534.

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(c) 2 *Jac. & W.* p. 519.

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Secondly. It is clear that the codicil is not the origin and foundation of the charity. It is plain, from the codicil, that there had been some previous arrangement and bargain between the testator and the Grocers' Company. He says "And whereas, for the said godly intent and purpose, I have taken order, and *it is agreed* between me and the Wardens &c. of Grocers, and have set out unto them in particular, certain lands," &c. If, at this distance of time the terms cannot be proved, they must be collected from the continued usage since the death of the testator.

The entries in the Defendants' books show, that from the death of the testator the Company considered they had a beneficial interest in the property. Immediately after the testator's death, it was moved "whether they would take upon themselves the said lands, to the intent aforesaid or not;" they directed them to be viewed, and an inquiry of "what years were granted of the same lands, and when the same shall expire." They declare themselves willing to receive the same, "and perform the will" and "received the same, with thanksgiving for his genteel remembrance;" and they direct all the expences relating thereto, and to the litigation with the heir to be paid out of the "goods of the house."

Thirdly. The continued usage adopted from the very commencement, shows distinctly the terms on which the Company undertook the management of the charity. Long usage has always been considered as affording evidence of the terms on which charity estates are held. *The Attorney General v. Catherine Hall* (a), *The Attorney General v. Caius College* (b), *The Attorney General v. Brazen Nose College* (c). Here from the hour the Defendants

(a) *Jacob*, 581.  
 (b) 2 *Keen*, 150.

(c) 2 *Cl. & Fin.* 295.

endants took possession, the payments have never corresponded with the rental ; the expences and deficiencies have been supplied from their private funds, and the surplus has, from that day to the present, been appropriated by the Defendants to their own use, notwithstanding the adverse claims of the heir and the litigation which ensued.

Fourthly, the rights have been determined by the decree of the Commissioners ; and this Court has no authority to alter or reverse it.

**Mr. Lloyd** for the schoolmaster.

**Mr. Turner** in reply.

***The MASTER of the ROLLS.***

The sums directed to be applied are, beyond all doubt, certain and definite sums ; however, in support of the information, it is contended, that the testator, by his codicil, intended the whole revenue of the property to be applied to the charitable purposes mentioned in the codicil, while, on behalf of the Grocers' Company it is argued, that there is no such general intention to be collected from the documents, and that he intended these particular sums only to be applied to the charitable purposes.

It is perfectly clear that this codicil was made after previous consideration by the testator. For effectuating his purpose, he was desirous of obtaining from the Crown a particular house, in which he wished the school to be established, and the poor bedesmen to dwell. It further appears, that he must have had some previous communication with the Company respecting this matter, because he mentions in his codicil that it had been agreed

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agreed to the effect there stated, and that for the purpose of his intended bounty, he had set out certain property for the payments of the stipends, &c.

It appears from the evidence, that from the time the Company obtained possession of the property down to the present time, they have never, at any period (unless it were at the period immediately following the great fire of *London*), applied the whole of the income derived from this property for the purposes of that charity.

I quite agree, that where a charitable trust has been established, a departure from that trust, continued for a great length of time, is not, merely from the length of time, to be considered as legally justified, but length of time is nevertheless a circumstance which is always very material to be taken into consideration, and may have different weight attached to it, according to the circumstances which have taken place. As public bodies of this nature are under no obligation to accept trusts of this kind, something which may be very material may take place at the time of the acceptance of the trust. It was so considered by Lord *Eldon* on more than one occasion. (a) On the other hand, the circumstances may shew, that although the strict directions of the trust have never been properly observed, yet that there never has been a sufficient cause or warrant for deviating from it. In that case, length of time cannot be used as any foundation for an adverse right.

In this case, however, taking simply the fact, that there never has been an application of the rents to this charity, conformable to the allegation made in this information, that the whole rent belonged to the charity,

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(a) See *Jacob*, 581.; and see *ante*, p. 386.

we must look narrowly to the terms of the codicil, and also to the circumstances which took place at the time when the Company obtained possession of the trust.

The circumstances which then took place are involved in a great degree of obscurity. The disputes which took place immediately after the death of the testator shew, that the proceedings of the Company were noticed and watched by persons who had an interest to do so, by Lady *Laxton*, who was giving up her life interest for the purposes of the charity, by the heir at law of the testator, who claimed adversely to the Company, and also by the officers of the Crown, from whom the school-house was to be obtained. Under these circumstances we find the Company apply less than the full amount of the rents for the purposes of this charity. I do not certainly mean to say that this would, of itself, be sufficient to shew the title of the Company, if the words of the codicil were clearly the other way.

Let us consider what is the rule of the Court under these circumstances, and how does that rule apply? It is one fortunate result from the number of these cases which have recently come before the Court, that there is now no dispute as to the general rule. It is now clearly admitted, that if the will be so expressed as to attach a charitable trust to the whole property, then, however deficient may be the appropriation of the whole amount of the rent, still the whole income will be subject to the charity, because it is to be applied according to a trust which extends to the whole of the property.

It comes therefore to this, does this codicil, by the words of it, attach a trust to the whole property? The cases which have been cited have been something to this effect:— the property has been given “on the trusts

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after mentioned" or "to the intent" that the devisees do so and so. Some general words have occurred, either in the beginning of the will, before the charitable purposes are stated, or, as in a case which was referred to (I think before Lord *Thurlow*), where certain specific sums are directed to be applied, and then general words follow, shewing it was the intention of the testator to apply the whole to charitable purposes. In such cases, whatever may be the amount of the rents or revenues of the property, and however they may exceed the particular stated applications directed by the will, the whole must be applied to charity.

I do not find in this codicil any statement that the whole of this property is to be applied to the purposes of the charity. What I find is, that the testator intended to establish a school and to have an establishment for his bedesmen. He intended to establish a school for ever, to be called Sir *William Laxton's* Free Grammar School; his "mind, will, and intent" was that the schoolmaster should have for his stipend 18*l.* a year, and the usher 6*l.* 13*s.* 4*d.* a year; his "mind, will, and intent" was that the seven poor men should have each of them 8*d.* weekly towards their maintenance and relief, and also lodging and dwelling. Those were the things which he was minded to do. After speaking of his agreement with the Company, he says that he had set out certain of his lands. Why? "As well for the payment of the stipends aforesaid appropriated to the said schoolmaster and usher, and for the poor men, as also for the repairs and maintenance of the said messuage or tenement." So that the messuage or tenement was to be obtained from the Crown, to be used for the school and bedesmen; and then he has set out these lands, as well for the payment of these stipends, as for the reparation of the messuage to be obtained from the Crown. He then makes

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the devise, "upon the condition and intent" that they should apply for the house, and then they were to provide a schoolmaster and usher, and make payment of the particular sums to them and to the seven poor men. I confess I do not think, amongst the various cases which have been before the Court at different periods, in which it has been argued, from the words of the bequest, that there was a charitable purpose applying to the whole property, there has been any case which has been so deficient of proper words for that purpose as the present. The purpose he had in view was a school and seven almsmen: to effect that purpose he provided fixed salaries, and provided a certain sum for repairs; and then he seems to have done with the matter, with the exception of something else which occurs at the end of this codicil.

I cannot take into my consideration, that if it had been suggested to the testator, at the time he was making his codicil, that the time might very likely come when the revenues would greatly increase, and when the fixed salary would be insufficient for the maintenance of the schoolmaster, he would have made provision for these cases. I have no right to do so. All I can do is to look at the words of his will for the purpose of seeing what is the intention there declared, and if I find the intention there declared to be such as not to affect the whole of the property, but to direct the application of particular sums only to the charity, I cannot extend it.

It is said (and so it would appear from the time when the will was afterwards proved) that the testator was dying, and that he had very little time fully to explain the matter. He says, "I will that for lack of convenient time further to explain," &c. Now he had fixed the sums, and he had fixed the place. If he had desired

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all these matters to be left open, every thing to be left open, he would have said, "I leave this property for the purpose; I have not time to settle what ought to be done with particular parts of it, or what expenses ought to be allowed. I must leave that to be settled by my executrix and overseers." Many such wills have been before the Court, where charitable dispositions have been made at a time when a scheme could not be settled, and it has been left to the Court to devise a scheme for the purpose, which it has often been under the necessity of doing: but here he says the purpose is a school, and the means of maintaining the school is to provide that building, and to provide these specified salaries. If there be any other thing, which other thing must mean the regulations of the school, those are to be settled afterwards.

Upon the best consideration I can give to this case, I am of opinion, that there is not in this codicil, a general devotion of the whole property to the charitable purpose in question; and I do not think there was an error in the non-application of the whole of this revenue, from time to time, to the purposes of the charity.

It seems that after the foundation of the charity the Company did, from time to time, augment the salaries. In that they did what appears to me to have been perfectly right; but I cannot agree with the argument which has been suggested to me, that this ought to be considered as evidence that they thought themselves under an obligation to do it. Though there was no legal obligation, still there was what may be called a moral obligation upon them. Having received property which has turned out of a much greater value than was expected by this testator, and the purpose for which he gave it to them being, that they should maintain this charity

charity in the way he had pointed out, it certainly may be considered as a moral duty on their part, when they found the revenues greatly increased, and the fixed payments had become manifestly insufficient to keep up the charity in an effectual manner, to make a fit and proper augmentation. It was quite right in them so to do; but I cannot consider the fact of their having done so, as evidence that they considered themselves to be, and still less as evidence that they were, subject to a legal obligation to do it.

I do not think that the decree of the Commissioners of Charitable Uses amounts to a declaration of right; it does seem to me to assume that which I think was right, and takes for granted that the Grocers' Company were entitled to the property, subject to the fixed payments. That is found by the jurors before whom the inquisition was taken, and the decree seems to me to assume it, though it does not, after investigation and discussion, declare the right.

It is material to observe, that before the Commissioners, the Company professed themselves to be willing to pay a larger sum than that which by the codicil they were bound to pay, and time was thereupon given to them to pay the arrears. I think I ought to consider the Company bound to pay those increased sums, because it was by the submission to pay those sums that they got an extension of time.

This information asks, that whatever sum may be found to belong to this school, some directions should be given for a scheme by which a larger instruction may be given to those boys who are entitled to the benefit of this school; and it is said that the Grammar School Act makes it proper so to do.

O o 9

The

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The argument, which certainly was conducted with very great ingenuity, has taken this shape. It is said the charity may not be entitled to the whole of this fund; yet it turns out that the present fixed payments are not sufficient to maintain a proper school, or to pay the salaries of the schoolmaster and usher of a grammar school: then, as it was, clearly, the primary intention of the testator that a grammar school should be maintained, that purpose ought not to fail, by the accident of these fixed salaries turning out, in the course of time, to be insufficient for the purpose. That the Court may therefore consider, in the first instance, what would be a proper sum to pay for the maintenance of such a grammar school as would effectually answer the intention which the testator had in view, and that may be a sum very considerably larger than that which he allowed, and that sum being ascertained, then, by the authority of the Grammar School Act, it may be applied in the maintenance of a school affording the general instruction pointed out by that act.

This might be very well, provided you were not encroaching upon a revenue, which, according to the construction which, it appears to me, ought to be put on this codicil, belongs, as private property, to this Company. If the testator has fixed on certain salaries which fail to provide for the fulfilment of his intention, no doubt it is very much to be regretted: but you cannot, at the expense of the Company, to whom the testator has given a beneficial interest, take that interest from them, upon the notion that the testator, if he had thought better of the matter, would have assigned a larger sum to the charity, or upon the notion that the legislature has interfered as against the interest of that party to provide a school where there may be a larger instruction.

I apprehend

I apprehend that the Grammar School Act can have no application to any case whatever, except where there are certain revenues appropriated to the instruction there pointed out. If there be a certain amount of revenue devoted to a school, and that school has, by the testator, been called a grammar school, and you cannot apply that fund beneficially for the instruction of boys in grammar, in consequence of the situation in which the school is placed, the change of circumstances, and so on, the Court may then apply that amount to a more general subject of education; but it cannot obtain a further fund for the purposes of general education, by encroaching on the private right of another party.

I do not therefore at present quite see my way towards making any order on that subject: I do not think I can make any order.

The information must be dismissed with costs.

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June 27, 28.
July 8.

A. mortgaged copyholds to *B.* by a deposit of a copy of his admission. *A.* died, and his heir mortgaged them to *C.* by deposit of a copy of his own admission. *C.* afterwards sold and conveyed the estate to *D.* *D.* had notice of *B.*'s security. Held, that it was unnecessary to determine whether *C.* took with notice of *B.*'s incumbrance, as by the deposit he could take only such interest as the

THE facts of this case are fully stated in the judgment; it is therefore unnecessary further to repeat them.

Mr. Kindersley, and Mr. Schomberg, for the Plaintiff.

Mr. Bagshawe, for Mr. Webb.

Mr. Pemberton Leigh, and Mr. Elderton, for Mr. Hinton.

Mr. Hallett, for Wilson.

Mr. Kindersley, in reply.

The following cases were cited: *Dryden v. Frost* (a), *Kennedy v. Green* (b), *Ferrars v. Cherry* (c), *Coppin v. Fernyough*,

(a) 3 *Myl. & Cr.* 670.

(c) 2 *Vernon*, 385.

(b) 5 *Myl. & K.* 699.

heir could give, namely, his interest subject to the equitable charge of the ancestor; and, secondly, that the conveyance to *D.* was void as against *B.*

In 1829 *A.* was admitted to a copyhold, and in 1832 he deposited the copy of his admission with *B.* as a security. In 1837 *A.*'s heir, after admission, attempted to sell the property without effect. *C.* acted therein as his attorney, and *D.* as the clerk of *C.* On the 20th of *July* 1837, *A.*'s heir mortgaged the property to *C.* by deposit of his own admission. In this transaction *D.* acted as the agent and clerk of *C.*, and as the agent of the heir. It appeared that in *Novem' er* 1835 *D.* had notice of *B.*'s incumbrance, and that on the 19th of *July* 1837 *D.* knew that the produce of the sale was to be applied in discharge of *B.*'s demand. Held, that the knowledge which *D.* possessed in *Novem' er* 1835 could not be imputed to *C.* in 1837. Secondly, that *D.*'s knowledge in *July* 1837 that the proceeds of the sale were to be applied in discharge of *B.*'s demand, did not clearly shew, that even he, at that time, recollect or knew that which he had known in *Novem' er* 1835; and, thirdly, ~~semble~~, that *C.*, who knew that the party from whom he took it had been admitted only as heir and that the ancestor had been admitted under copy of Court Roll, dated in 1829, must be deemed that the ancestor, having the copy of Court Roll, might have created an equitable mortgage by deposit, and consequently that *C.* ought to have required its production before he advanced his money.

Fernyough (a), Hall v. Smith (b), Daniels v. Davison (c), Allen v. Anthony (d), Jackson v. Rowe (e), Whitbread v. Jordan (g), Brace v. Duchess of Marlborough (h), Beckett v. Cordley (i), Jones v. Jones (k), Morret v. Paske (l), Barnett v. Weston (m), Frere v. Moore (n), Hiern v. Mill (o), How v. Weldon (p), Meux v. Seager (q), Ex parte Pollard (r), Smith v. Chichester (s), Le Neve v. Le Neve (t), Hargreaves v. Rothwell. (u)

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The Master of the Rolls.

July 8.

This is a bill filed by equitable mortgagees for a foreclosure of the mortgaged estate, against another equitable mortgagee, a purchaser who obtained the legal estate, and a legal mortgagee under the purchaser.

In the month of *December 1829* *Robert Webb*, being about to purchase a copyhold estate, borrowed the sum of *150l.*, and as a security for the repayment, gave to the Plaintiffs a promissory note, and signed an agreement for the deposit, of what were called the deeds of the premises, as soon as the same should be made out and in his lawful possession.

Robert Webb, having been admitted tenant of the premises, received a copy of the Court Rolls of the manor

(a) 2 Bro. C. C. 291.	(n) 8 Price, 475.
(b) 14 Ves. 426.	(o) 13 Ves. 114.
(c) 16 Ves. 249.	(p) 2 Ves. sen. 516.
(d) 1 Mer. 282.	(q) 1 Mont. Deac. & De Gex, 396.
(e) 2 Sim. & St. 472.	
(g) 1 Y. & Col. (Exch.) 303.	(r) Mont & Chitty, 259.
(h) 2 P. Wms. 491.	(s) 2 Dr. & War. 393. 3 Sugden Vend. & Pur. 10th ed. p. 453.
(i) 1 Bro. C. C. 355.	(t) 3 Atk. 646.
(k) 8 Sim. 635.	(u) 1 Keen, 154.
(l) 2 Atk. 52.	
(m) 12 Ves. 150.	

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manor of which the premises were held. The copy was dated the 18th of *December 1829*, and on the 12th of *July 1832* he placed it in the hands of the Plaintiffs, with a declaration in writing signed by him, and which was in these words :—

“ *Bristol, July 12th, 1832.* ”

“ I do hereby declare, that the deeds annexed hereto, left in the possession of Messrs. J. and T. Tylee, are as a security for an amount of 150*l.*, which I am indebted to said firm for cash advanced, and for which, interest at 5 per cent per annum I agree to pay; and they are duly authorised to hold the same until the said amount of 150*l.* and interest shall be fully paid.

“ *Robert Webb.* ”

Under these circumstances, the Plaintiffs became equitable mortgagees of the copyhold estate in question.

Robert Webb died intestate on the 13th of *October 1832*, leaving the Defendant *Thomas Webb* his customary heir, and, as such, entitled to the estate, subject to the Plaintiffs' equitable mortgage; and on the 7th of *November 1833*, *Thomas Webb*, as the heir of *Robert*, procured himself to be admitted tenant of the estate, and a new copy of Court Roll was granted to him. He paid the interest of 150*l.* to the Plaintiffs up to *October 1834*; and if it be true, as has been said, that he thought he was paying interest on 150*l.* secured by a promissory note, and was not, at first, aware of the equitable mortgage, the fact becomes immaterial, because it is proved that on the 10th of *April 1837* he had distinct notice of the mortgage. He had the legal estate, the copy of the roll shewing his own admittance, and notice that the copy of the roll shewing the admittance

of

ose heir he claimed, was in the
s equitable mortgagees.

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attempt to sell the estate by
of July 1837. The Defendant
a solicitor employed to effect the
Battiscombe took an active part in the
ale was not effected, and consequently
bb was desirous to raise an additional sum
of loan, and Mr. Hinton was induced to lend
50*l.* on a deposit of a copy of Court Roll of his
own admittance.

A question is raised, whether, at the time of this
advance, Mr. Hinton had, or ought to be deemed to
have had, notice of the Plaintiffs' equitable mortgage.

It appears, by a letter which was written by *Battiscombe* to *Kelly* (an agent of the Plaintiffs) on the 30th of November 1835, that *Battiscombe* then knew, from the information of *Webb*, that the Plaintiffs had a security on the premises; and further, by a letter which was written by *Battiscombe* to *Webb* on the 19th of July 1837, that *Battiscombe* then knew that the proceeds of the then intended sale were to be applied in discharge of the Plaintiffs' demand, and on the occasion of *Hinton*'s loan, *Battiscombe* acted not only as his agent and clerk, but also as the agent of *Webb*, of whom he seems to have been a particular friend; and for the security of *Hinton*, *Battiscombe* sent to *Webb* for his signature, a memorandum of agreement, dated the 20th of July 1837, and which *Webb* afterwards signed, whereby it was stated, that *Webb* had deposited with *Hinton*, a copy of Court Roll, dated the 7th of November 1833, stating that, at a Court held on that day, he, as the only son and heir of *Robert Webb*, who held, by virtue of a copy of Court

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Court Roll, dated the 18th of *December 1829*, the estate in question, to which *Thomas Webb* claimed to be entitled as only son and heir of *Robert*, and that he was admitted tenant of the estate, and had deposited the copy of Court Roll as security for the 50*l.* advanced by *Hinton*, and interest.

It does not appear to me that the knowledge which *Battiscombe* possessed in *November 1835* can be imputed to *Hinton* in 1837, or that *Battiscombe's* knowledge, in *July 1837*, that the proceeds of the sale were intended to be applied in discharge of the Plaintiffs' demand, clearly shews, that even he, at that time, recollects or knew that which he had known in *November 1835*; and though I incline to think that *Hinton*, who knew that *Thomas Webb* had been admitted only in his character of heir of *Robert Webb*, and that *Robert Webb* had been admitted under copy of Court Roll, dated the 18th of *December 1829*, must be deemed to have known that *Robert Webb*, having that copy of Court Roll, might have deposited it so as to create an equitable charge upon the estate, and, consequently, ought to have required its production before he advanced his money, yet it does not appear to me to be necessary to determine whether *Hinton* had, or ought to be deemed to have had, at that time, notice of the Plaintiffs' right, for I think that under the circumstances, and by mere deposit of the son's copy of Court Roll, he could take only that which *Webb* the son could give, which was the interest he was entitled to as his father's heir, subject to the charge which his father had made: and however this may be, it is proved that in the early part of *February 1838*, Mr. *Hinton* had direct and distinct notice of the Plaintiffs' claim; and upon the evidence which is given, I am of opinion that the other Defendants, *Wilson* and *Lloyd*, must, throughout the transactions in which they are concerned, be deemed to have

have had all the notice of the Plaintiffs' claim which *Hinton* had.

The estate having been sold to *Wilson*, whose mortgagee *Lloyd* is, and the purchase-money being now in the hands of *Hinton*, the Plaintiffs have, at the bar, claimed to have the purchase-money applied, as far as it will extend, in satisfaction of their claims, and a right to proceed to foreclose the estate, if the residue of what may be due to them shall not be paid by the Defendants personally. No such claim is made by the bill, nor could it have been sustained. The Plaintiffs cannot have security upon both the estate itself, and the purchase-money which represents its value.

On the other hand, it has been objected, that the Plaintiffs have unnecessarily made some of the Defendants parties to the cause; but considering this as a bill of foreclosure, I think that every one of the Defendants was a necessary party, because each of them had a right to redeem.

On the whole, I am of opinion, that the Plaintiffs are entitled to have the ordinary decree for foreclosure of the equitable mortgage to which they are entitled.

I shall make the decree, unless the parties agree to confirm the sale, and to go against the purchase money.

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NOTE.—An appeal to the Lord Chancellor is pending.

1843.

March 25. 30.

MARSHALL *v.* MELLERSH.

A Plaintiff may call for information of a very minute character, which the Defendant is bound in duty to afford, yet he may do it in such a way as to amount to what is called impertinence, or prolixity amounting to impertinence.

Where a party is required to set forth information, and he refers to a book containing all that information, it will be impertinent for him afterwards to repeat the information contained in that book.

THIS case came before the Court upon exceptions for impertinence.

*Henry Marshall and Thomas Mellersh* carried on business as solicitors in partnership, under articles dated in 1817, and which expired in 1828. This bill was filed for taking an account of the partnership transactions. It alleged that many matters of business had been omitted in the books of account, and that the matters entered therein had not been fairly made out. The bill called upon the Defendant, in the most extensive terms, to set out a full, true, and particular account of the several accounts, receipts, matters, and things relating to the partnership.

The bill was not of any excessive length, but the second answer, which was put in after exceptions had been taken to the first, contained schedules comprising the several items of account, &c., of a very minute character, in consequence of which the answer exceeded 1400 folios in length.

Exceptions having been taken thereto, they were allowed by the Master, and the case now came before the Court upon exceptions to the Master's report. The circumstances, so far as they are necessary to explain the principle of the decision, are sufficiently detailed in the judgment of the Court.

The case was argued by

Mr.

Mr. *Turner* and Mr. *Freeling*, for the Defendant;  
and by

Mr. *Pemberton Leigh* and Mr. *Dixon*, for the Plaintiff.

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The following cases were cited: — *Tench v. Cheese* (a),  
*Byde v. Masterman* (b), *Alsager v. Johnson* (c), *Norway v. Rowe* (d), *Beaumont v. Beaumont*. (e)

*The MASTER of the ROLLS.*

I cannot look at this case without feeling the greatest regret that this species of litigation should be carried on between these parties, in a case, in which, after all, the question is merely one of partnership account.

The Plaintiff is in possession, and, it would appear, has been in possession, if not of the whole, at least of a very great part of the information in respect of which he has, by this bill, sought very minute and detailed discovery. It seems that he is in possession of partnership books, which contain the entries relating to all those matters. Alleging, however, on his part, that those books do not contain all the entries relating to these matters, and alleging also, in substance, that some of the entries relating to those matters are not fairly made in the books, he calls upon the Defendant to set forth, minutely and particularly, the detailed accounts of the several things as to which he seeks discovery. He does not call upon the Defendant to set forth in what respect the accounts stated in the books are erroneous, but to set forth particularly all and every the particular items. Why he thought fit to adopt that course of proceeding, it is certainly

(a) 1 *Beavan*, 571.

(d) 1 *Mer.* 347.

(b) 1 *Cr. & Ph.* p. 268.

(e) 5 *Mad.* 51.

(c) 4 *Ves.* 217.

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certainly very difficult to conjecture. He possibly had some reason for it, and some reason for presenting his interrogatory in that very unlimited form.

The question for me to consider, upon these several exceptions, is, in the first place, whether the Plaintiff has called for the minute information which is given by these schedules, and if he has, then whether the Defendant has afforded it in a proper manner; because it may happen that a Plaintiff may call for information of a very minute character, which the Defendant is bound, in duty, to afford, yet he may do it in such a way as to amount to what is here called impertinence, or prolixity amounting to impertinence.

The first exception before me relates to small expenses incurred by the Defendant, and to receipts and payments made by him out of the partnership monies in respect of those expenses. The Master has sanctioned several parts of the information afforded by the Defendant in that respect, but he has not sanctioned that part which is now excepted to. Now if that part had been no more than a mere copy of so many folios of a particular book, where all the information was collected, it would have been subject to a consideration which the other exceptions may be subjected to; but, as I understand the case, the Defendant, in obtaining the information afforded by this schedule, has had to investigate several of the partnership books, for the purpose of collecting thereout the several items relating to this particular subject of inquiry. He has certainly done that with great minuteness. He has set forth a great number of very small sums: it might be, and I think it is called for by the words of the bill; it might be, and I think it is, from the nature of them, necessary for the case of the Defendant, that those particulars should be set forth;

and

and after all the argument which has occurred upon this subject, I cannot find that that part of the first schedule here referred to, is liable to the charge of impertinence, if it be not liable in respect of the constant repetition of the words "cash expenses."

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v.
MELLERSH.

I cannot help thinking that this might, by possibility, have been avoided. I think that, if some more pains and trouble had been bestowed upon the form of the schedule, it might have afforded to the Plaintiff all the information which he asked, and it might have afforded to the Defendant all the defence and protection which he was entitled to, if it had been shortened by some few words in the schedule; but I am by no means of opinion that I can or ought to consider the addition of these words, from time to time, in every line, was intended for oppression. I think that the words are unnecessary, but I do not think them irrelevant. They belong to the subject, and therefore I cannot allow that exception.

With regard to the second exception, which relates to the bankers' books, it appears that the Defendant is called upon to set forth, not merely the balances which are required in one of these interrogatories, but also what sums of money were, from time to time, paid into the bank, and by whom paid in, from time to time. The Defendant has, in one instance in his answer, referred to the bankers' pass-book, as containing the information which is required by that part of the bill, and has, for that purpose and by reference to it, made it a part of his answer. I think that if, after doing that, he had not been called upon, in another part of the bill, to give more information than is contained in the pass-book, he ought again to have referred to it, without setting forth the minute details. But if, as I understand it, he was, in the subsequent part

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of the bill, called upon to set forth some information relating to those payments which was not in the pass-book, then, in addition to the reference to the pass-book, he was required to set forth something more to meet that subsequent requisition. Now with regard to that, it seems, that the pass-book contains no information as to the persons by whom the money was paid in for the first ten years of the account, and that the answer contains no more information than that which is in the pass-book, which in the previous part of the answer had been made a part of the answer. But in the subsequent part of the schedule, during the remaining ten or eleven years more, during which this partnership lasted, there are several items in the account, of sums paid in and out of the bank, with the names of the persons by whom they were paid in, that is, with information in addition to that which is contained in the pass-book, and which information therefore could not be afforded to the Plaintiff, who had required it, by a reference to the pass-book, and by making it a portion of the answer. It does appear to me, therefore, that this schedule is in part relevant, and necessary, and, therefore, not impertinent; but as to the other parts, that it is wholly unnecessary, in consequence of that book having been made a part of the answer. I must refer that part back to the Master to consider and review his report.

Upon the other exceptions, which relate to the bills of costs, the matter certainly does rest in a most strange position. These gentlemen were carrying on business as solicitors, and the charge is, that the business of the firm done by one partner has not been properly charged for, and, consequently, that the partnership has not had the benefit which it ought to have received, by a due remuneration given for the services done and performed by one of the parties. The bill books being
all

all in the hands of the Plaintiff, he had every means of knowing what charges were there made, and whether they were right or not. He had not, perhaps, the means of knowing, without inquiry of the Defendant, whether all the business which had been done by the Defendant had been brought into the account. That was a matter which might have been very properly inquired after, but that is not the discovery sought for by this interrogatory; for the bill, instead of charging and inquiring for that which was not contained in the bill books, and not contained in the partnership books, calls upon the Defendant to set forth a number of most minute particulars. It charges "that the Defendant ought to set forth a full, true, and particular account of all and every the purchases and sales of property, by or on behalf of *Thomas Mellersh*, which have been conducted and transacted by the partnership or at the partnership offices, or at the partnership expense; and all deeds, indentures, bonds, contracts, agreements, and other documents, prepared and engrossed by the partnership, or in the partnership offices, or at the partnership expense, for or on account of *Thomas Mellersh*, and on his private or separate account; and also of all actions, suits, indictments, and other proceedings at law and in equity, which have been had, commenced, prosecuted, defended, or conducted by the partnership, or at the partnership offices, or at the partnership expense; and the full, true, and utmost amount and value of all such business, matters, and things so done and performed, according to the usual rates of charge to the clients generally of the partnership; and of all entries made in all, or any, or either of the books of the partnership, or of *James Limbert* or of *Thomas Mellersh*, of or relating to such last-mentioned business, and in what instances, and for what reasons, any such entries were omitted to be made;" it seems to be an account of all entries

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according to the usual rates generally of the partnership, all, or any, or either of the boc of *James Limbert*, or of *Thoma* to such last-mentioned busine and for what reasons, any suc be made (which means, of cour such business which were omi quite persuaded that this was consideration of the matter, been thrown in, in such a wa difficult for the Defendant to d

In the answer to this inter has set forth an exact copy which have been incurred in are here referred to. He has ness which were done, and t exact copy of all the bills of cc Now however this interrogato not what is asked for: the I for a copy of the bills of cost

1843.

## VANDALEUR v. BLAGRAVE.

June 29, 30.

July 1.

Nov. 6.

**M**R. PEMBERTON LEIGH, Mr. Kindersley, and Mr. Romilly, for the Plaintiff.

The Solicitor-General, Mr. Tinney, and Mr. Tripp, for the principal Defendant.

Mr. Paynter for a trustee.

*Parnther v. Gaitkell (a), Barker v. Greenwood (b), Stewart v. Aberdein (c), Preston on Abstracts. (d) Kennedy v. Green (e), Johnson v. Baker (g),* were cited.

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**The MASTER of the ROLLS.**

This bill prays, that an indenture of release and re-assignment, dated the 16th of November 1830, may be declared to be fraudulent and void, and may be delivered

(a) 13 East, 432.

(d) Vol. I. page 299.

(b) 2 Y. & Col. 414.

(e) 3 Myl. & K. 699.

(c) 4 Mee. & W. p. 218.

(g) 4 B. & Ald. 440.

granted to the Plaintiff an annuity, redeemable on six months' notice. In May 1830, notice was given to repurchase in November, and in August 1830, the Defendant entrusted *Yates* with the money for the repurchase. In October, *Yates* prevailed on the Plaintiff to execute the deed of reassignment, dated in November and indorsed on the annuity deed, without receiving the repurchase money, but the Plaintiff did not sign any receipt for the money. *Yates* afterwards produced the deed to the son of the Defendant, to satisfy him of the payment, and it was handed back to *Yates* to be kept by him with the Defendant's other documents. *Yates* acted in the transaction as agent of both parties. He retained the money, and to deceive both, continued the payment of the annuity, but afterwards died insolvent. The Defendant subsequently obtained possession of the deed. Held, under the circumstances, that the Defendant was not discharged, but was bound to pay to the Plaintiff the repurchase money, with interest from November 1830, the Plaintiff accounting for the subsequent receipts of the annuity.

Double agency.  
Grantor of an annuity entrusted *Y.* with a sum of money for the purpose of redeeming it. *Y.*, without paying the money, obtained from the grantee a deed of release of the annuity. *Y.*, who acted in some respects as agent of both parties, afterwards died insolvent. Held, under the particular circumstances, that the loss must be borne by the grantor.

The Defendant, through the agency of one *Yates*,

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 VANDALEUR
 v.
 BLAGRAVE.

vered up to be cancelled; and that the Defendant Mrs. *Blaggrave* may be ordered to pay to the Plaintiff the sum of 2500*l.*, for the repurchase of the annuity of 500*l.* in the pleadings mentioned, together with the arrears of the annuity, accrued or to accrue, till the time of the repurchase thereof; or that Mrs. *Blaggrave* may pay to the Plaintiff all arrears and future payments of the same annuity, the Plaintiff offering to do what may be required of him in either case.

The annuity in question was granted by Mrs. *Blaggrave* to the Plaintiff by indenture dated the 16th of November 1827. It was made payable to the Plaintiff during the life of Mrs. *Blaggrave*, out of an annual rent-charge of 800*l.* to which she was entitled; and for the purpose of securing the payment of the annuity, the rent-charge was assigned to the Plaintiff. Covenants for further assurance were entered into, and Mrs. *Blaggrave* covenanted to do all reasonable acts to enable the Plaintiff to insure her life in respect of the annuity, and that a judgment, to be entered on record against Mrs. *Blaggrave* at the suit of the Plaintiff, should be a further security.

It was further provided, that if the Defendant were desirous to repurchase the annuity, and should give six calendar months' previous notice, in writing, of her intention to the Plaintiff, or in lieu thereof, tender him 2500*l.*, the Plaintiff would, at the expiration of the six calendar months, and on receiving all arrears and costs, accept 2500*l.* in full for the repurchase of the annuity, and would, thereupon, release or assign the same, and the rent-charge of 800*l.*, and all other securities for the same, to Mrs. *Blaggrave*, or as she should appoint, and would acknowledge satisfaction of the judgment, and would, on receiving from her a proportionable

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part of any premiums paid, assign to her any policy of insurance effected upon her life in respect of the annuity.

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A memorial of the deed was duly inrolled in this Court; and in pursuance of a warrant of attorney executed by Mrs. *Blaggrave*, judgment was duly entered up against her, at the suit of the Plaintiff, in the Court of Queen's Bench, for the sum of 5000*l.*, and a policy of insurance in the *Pelican* Life Insurance Company was effected on her life, in the name of the Plaintiff, and on his behalf, for the sum of 2800*l.*

In the year 1830, Mrs. *Blaggrave* intended to redeem the annuity, and, for that purpose, to pay what was due to the Plaintiff, and at the same time, as it appears to me, the Plaintiff intended to receive what was due to him, and thereupon to release the annuity, and re-assign the rent-charge to Mrs. *Blaggrave*.

The parties themselves acted in good faith, but *Thomas Cooksey Yates*, who acted as agent for them both, in the treaty for the annuity and on various other occasions, committed a gross fraud. Being intrusted with money belonging to Mrs. *Blaggrave* sufficient to redeem the annuity, he was directed to redeem it; and having the money in his hands, but concealing that fact, he prevailed on the Plaintiff to execute a deed of release and re-assignment, without receiving the money, but in the expectation of receiving it on a future day, and thus he contrived to keep the money in his own hands for his own purposes.

The money has in fact never been paid, but the deed which was executed by the Plaintiff has come into the hands of Mrs. *Blaggrave*, and she now claims the benefit

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of it. The questions in the cause are, whether the deed is valid and binding to any and what extent; whether the Plaintiff is to lose his annuity, although he has never received any consideration for its redemption, or whether Mrs. *Blaggrave* is to continue subject to the annuity, although she directed her money in the hands of *Yates* to be applied for its redemption, or whether, in the result of the transaction, it ought to be held that there was a valid contract for the redemption of the annuity, which ought now to be carried into effect by payment of the redemption money and interest.

We must consider the relation between the parties and Mr. *Yates*, and their respective acts.

Mr. *Yates* was, or soon after the commencement of these transactions became, a barrister. He had been acquainted with and employed by the Plaintiff before the year 1827. In *September* 1827 he was first introduced by Mrs. *Blaggrave* and her son *Anthony*, in whom she appears to have placed, and still to place implicit confidence, and being then informed that Mrs. *Blaggrave* was in want of money, he informed her, that the Plaintiff would probably assist her with a loan of 2500*l.* This communication led to the treaty for the grant of the annuity, and Mr. *Yates* was intrusted by both parties with the management of the transaction.

From the date of the deed in *November* 1827, till *December* 1832, the Defendant employed Mr. *Yates* in various transactions: he advised her as a lawyer, he received and paid money for her, as her agent, to a very large amount, and her deeds, securities, and papers were placed in his hands.

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And the Plaintiff instructed him to hold the deed of the 16th of *November* 1827 on his behalf, to receive the annuity for him, and to pay the premiums of insurance thereout, and also employed him in some other transactions, and, as it appears, placed great confidence in him.

Till the month of *May* 1830, the annuity was paid to the Plaintiff by Mrs. *Blaggrave* through *Yates*, who having thereout paid the premiums of insurance, together with any other sums which the Plaintiff might have authorised, accounted with the Plaintiff for the surplus.

In the month of *May* 1830, Mrs. *Blaggrave*, expecting to receive money with which the annuity might be redeemed, it is said, (and as the Plaintiff states it in his bill, I must, as against him, take the fact so to be,) that *Yates*, as her agent, and on her behalf, gave notice to the Plaintiff, that it was her intention to repurchase the annuity in the following month of *November*; and before the time of redemption arrived, viz. in *July* 1830, Mrs. *Blaggrave*'s son, *Anthony*, who acted for her, inquired of *Yates* what sum would be necessary for the redemption of the annuity, and for some other purposes, and having ascertained the amount, he says that he paid the same to *Yates* for the express purpose, amongst other things, of releasing the annuity.

*Yates* having the money, or having money belonging to Mrs. *Blaggrave* sufficient for the purpose, and having in his possession the deed of the 16th of *November* 1827, caused to be indorsed upon that deed a deed purporting to bear date the 16th of *November* 1830. This is the deed now in question, and it purports to witness, that in consideration of 2500*l.* then paid, the Plaintiff released

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released the annuity of 500*l.*, and re-assigned the rent-charge of 800*l.* to Mrs. *Blagrave*, and assigned to her the policy of insurance.

On the 11th of *October* 1830, the Plaintiff was at *Carass* in *Ireland*, and *Yates* came to him there with the indorsed deed so prepared. The Plaintiff now alleges, that *Yates*, so far from stating that he had received the redemption money from Mrs. *Blagrave*, pretended that he had not; that she had, indeed, meant to redeem the annuity by money to be raised by the sale of stock, but as the price of stocks had fallen, she wished for some delay, in the hope that the price would rise again; and that, thereupon, *Yates* assured the Plaintiff, that if he would execute the deed of re-assignment, *Yates* would retain it in his own custody, until the 2500*l.* should be paid to him by Mrs. *Blagrave*, for the Plaintiff; and that the Plaintiff, relying on the integrity of *Yates*, did accordingly execute and deliver to him the deed of re-assignment, but that as no money was then paid, the Plaintiff did not sign any receipt for the 2500*l.*

It appears from the evidence of Sir *David Roche*, who was present during the interviews between the Plaintiff and *Yates* on the 11th of *October* 1830, that *Yates* at first said, that he had come to pay off the money and to redeem the annuity, and that the Plaintiff then complained of having so large a sum of money thrown upon his hands, without notice of paying it off, and asked the advice of the witness as to how he should act; and that the witness thereupon asked *Yates*, whether he had the money with him, or why he was in such haste; to which *Yates* answered, that he had not the money, but that it was in the *English* funds, and that Mrs. *Blagrave* was getting only 9*1*/*2* per cent. besides insurance,

surance, and would not continue to do so. The witness then advised the Plaintiff to insist on six months' notice; to which *Yates* objected, and said, that notice was mere matter of courtesy; that he had brought over the deeds of assignment to get the annuity reconveyed, and that, as soon as he took them back, the money would be sent over.

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It is to be observed, on this evidence, that the Plaintiff appears to have insisted, that he had received no notice of Mrs. *Blaggrave*'s intention to redeem the annuity. By his bill he states that notice was given in *May*. Mr. *Anthony Blaggrave*, in his evidence for the Defendant, says, that the notice was given by a letter which he wrote to *Yates*, requesting him to give notice to the Plaintiff, and that, as he best recollects, the notice was given in *July*.

There is thus some obscurity about the notice, for notice in *July* to redeem in *November* would not have been valid; but admitting, because the bill so states it, that a valid notice was given in *May*, the time for redemption did not arrive till *November*. It was not till the 16th of *November*, that the Plaintiff, if not offered interest in anticipation (of which there is no evidence), was bound to receive the principal sum and release the annuity; and, therefore, having regard to the notice now admitted, the Plaintiff might reasonably complain, that he was asked to take the money too soon; and, further, it is to be observed, that the deed which was executed in *October*, was made to bear date on the 16th of *November*, and was acknowledged to be executed, in consideration of money paid at or before the sealing and delivery thereof. This was false; the deed was executed, but no money was paid, no receipt was signed, and

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and in this state of things, the deed was placed in the hands of *Yates*.

Yates, having the money of Mrs. *Blaggrave*, ought to have paid it to the Plaintiff, upon the execution of the deed at the proper time; and having got the executed deed into his hands, he ought not to have parted with it till the Plaintiff had received the money.

Anthony Blaggrave states, in his evidence, that he had an interview with *Yates* at *Bristol*, immediately after *Yates* returned from a visit to the Plaintiff in *Ireland*; that *Yates* then told him that he had paid 2750*l.* for the repurchase of the annuity, and produced to him the deed of release, and, to the best of his recollection, a warrant of attorney; that these instruments were produced, for the purpose of satisfying him (the witness) that *Yates* had repurchased the annuity; and that the deed having been delivered to him, he gave it back to *Yates*, to be kept by him with the other documents of Mrs. *Blaggrave*.

After the occurrence to which this evidence relates, we find, on the one side, that the Plaintiff fully expected the money to be paid; for on the 17th of November 1890 he wrote to *Yates*, desiring him to invest it in *Irish* 3 per cent consols; but *Yates* afterwards represented to him, that the money was not paid, and that the annuity was still on foot; and *Yates*, pretending himself to be the agent of Mrs. *Blaggrave* in that respect, affected to treat the notice as withdrawn; and in the course of the correspondence, the Plaintiff, either not recollecting what had passed, or perhaps confused between his own recollection and the statement of *Yates*, in whom he greatly confided, appears to have acquiesced in statements (such as that of an actual tender) which are inconsistent

consistent with the evidence ; but upon pretence of the notice being withdrawn, *Yates* continued to pay or account to the Plaintiff, for the sums which would have become due upon the annuity if subsisting.

On the other side, Mrs. *Blaggrave* and her agent were satisfied that the annuity was redeemed ; the redemption money was charged to Mrs. *Blaggrave* by *Yates* in account ; and accounts were afterwards settled between *Yates* and Mrs. *Blaggrave*, on the footing of the payment for the redemption having actually been made.

The annuity was paid to the Plaintiff till November 1836, and the insurance was kept up, in the Plaintiff's name, till November 1834, but afterwards in the name of Mrs. *Blaggrave*. *Yates* absconded soon after November 1836 ; not long after that, he died in insolvent circumstances ; and Mr. *Anthony Blaggrave*, having become his legal personal representative, obtained possession of the document in his possession.

After the departure of *Yates*, the Plaintiff demanded payment of the annuity from Mrs. *Blaggrave*, and this suit is the consequence of her refusal to pay.

It does not appear to me, that after the year 1830 there was, on either side, any laches or neglect, of which the other had any just right to complain. I think that the decision of the case must depend on the relation between the parties and their respective acts and omissions in the year 1830.

It appears to me, from the evidence, that on the 11th of August 1830, when Mrs. *Blaggrave*, by the agency of her son *Anthony*, gave to *Yates* a cheque for 11,496*l.* 9*s.*, which he afterwards received, she intended and

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and directed, that a sufficient part of that sum should be applied in redeeming the annuity which she had granted to the Plaintiff. She says, and there is no reason to doubt her statement, that neither she nor her son ever saw the notice for redemption, or any copy of it, and that they were not aware that the annuity could not be redeemed till *November*. Thinking that the annuity might be redeemed at once, they trusted to *Yates* to procure the proper releases. As it is stated in the answer, they considered, that *Yates* was the person through whom the redemption money was to be paid to the Plaintiff, and they expected that he would procure from the Plaintiff such instruments as were necessary to extinguish the annuity, and convey to Mrs. *Blaggrave* the premises on which the same was secured.

Anthony Blaggrave says, that he wrote a letter, and requested *Yates* to give notice to the Plaintiff of Mrs. *Blaggrave*'s intention to redeem the annuity. This request was to be complied with by *Yates*, as the agent of Mrs. *Blaggrave*. The letter containing it cannot be, itself, taken as a notice given to the Plaintiff through *Yates* as his agent. But *Yates*, as the agent of Mrs. *Blaggrave*, was to give the notice; and the notice being, as the bill admits, given in *May*, was for payment in *November*, and a knowledge of the contents must, notwithstanding the real ignorance which may have existed, be imputed to Mrs. *Blaggrave*. I cannot, under the circumstances of this case, act as if Mrs. *Blaggrave* did not know, and was not to be bound by, what was done by her agent on her behalf according to her instructions.

Again, considering that the sum of 11,496*l.* 8*s.* was given to *Yates* on the 11th of *August* 1830, for the purpose of thereout paying what was due to the Plaintiff,

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I am of opinion, that the money cannot be considered as so paid to *Yates*, on behalf of the Plaintiff or as his agent. *Yates* did not receive the redemption money separately, but as part of an aggregate sum, which he was to divide and apply for the purposes of Mrs. *Blaggrave*. In executing these purposes, it seems plain, that he was to act as her agent; and as to the part of the aggregate sum which was to be applied in redeeming the annuity, he must be deemed to have held it as her agent, for the purpose of that application. It was not payable to the Plaintiff till *November*. In the mean time, *Yates* was responsible to her only for its employment; and her direction being to redeem the annuity, it was his duty to her to retain it for her, till he had also, as her agent, obtained for her, releases from the Plaintiff.

Under these circumstances, I conceive, that *Yates*, when he saw the Plaintiff in *Ireland*, acted as the agent of Mrs. *Blaggrave*. Whatever mistake may have been made by the Plaintiff in respect to any notice having been given to him, it is plain, that under the notice as admitted in the bill, and on which the Defendant is entitled to rely, there was no obligation, on the part of the Plaintiff, to receive the money in *October*, or at any time before the 16th of *November*; and under these circumstances, the Plaintiff having in *October* executed the deed, which was post-dated the 16th of *November*, and the warrants of attorney, which were not dated at all, but not having received the money, the nature of the transaction appears to me to show, that the Plaintiff intrusted *Yates* as his agent, to hold these deeds till the money was paid to him. It would, I think, be absurd to suppose that the Plaintiff delivered these instruments without consideration to *Yates*, as the agent of Mrs. *Blaggrave*, and this is scarcely alleged on her behalf; but it is argued, that *Yates*, having the deeds as the agent of

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of the Plaintiff, on his return to *Bristol*, delivered them in his character of such agent to *Anthony Blaggrave*, as the agent of Mrs. *Blaggrave*, who relied thereon as evidence of the payment, and that the Plaintiff, although he had received no consideration, was and is bound by such delivery.

If the money had not been previously paid to *Yates*, but *Yates*, having the annuity deed and the executed deed of release in his possession, had offered them to *Anthony Blaggrave* in exchange for the money, and if *Anthony Blaggrave* had been thereby induced to give credit to *Yates*, and had, under such inducement, paid the money to *Yates*, who had afterwards applied the money to his own use, the transaction might have been binding on the Plaintiff; because his act in giving *Yates* possession of the deeds, and thereby enabling him to produce them, might have been deemed to be the cause of *Anthony Blaggrave*'s misplaced confidence, and of the fraud of *Yates* which thence ensued, and in the transaction, as so supposed, *Yates* would have been acting solely as the agent of the Plaintiff, and *Anthony Blaggrave* as the agent of the Defendant.

But in the transaction, as it really occurred, *Yates* was the agent of Mrs. *Blaggrave* for the payment of the money, both before the deed was executed by the Plaintiff and afterwards. Being her agent (and he was not the less so because he was also agent for the Plaintiff), and whilst he continued to be, and acted as such agent, he was endeavouring to commit, or acquiring the power to commit, a fraud upon the Plaintiff, first, in procuring the deed to be executed at a time when the money was not paid or payable; and, secondly, in producing the deed to *Anthony Blaggrave*, although the money had not been paid. In withholding the money  
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when the deed was executed, and in thus producing the deed, he was also acquiring a power to commit a fraud upon Mrs. *Blaggrave*; and whilst *Yates* was acquiring this power, and was deceiving both parties, it appears that Mrs. *Blaggrave* was not induced, by the Plaintiff's deed, to intrust *Yates* with the money, and that the Plaintiff was not induced, by the Defendant's payment to *Yates* (of which he was ignorant), to intrust *Yates* with the executed deed.

But the agency for the redemption began with the Defendant. Whilst the money remained in the hands of *Yates*, he was her agent for its due application, viz. for its payment to the Plaintiff. By giving him the money beforehand, she afforded him the means, perhaps presented to him the temptation, to commit the fraud; and *Anthony Blaggrave*, her agent, being totally unconscious of the fraud which he was enabling *Yates* to commit, and well knowing that by her the money had been honestly supplied to *Yates*, in whom she had confidence, for the purpose of payment, may not have examined the proof of payment as carefully as he would have done, if the money had been to be paid on production of the deed.

The complication of the case arises from the double agency of *Yates*, and from the undue confidence placed in him by the Plaintiff in respect of the deed, as well as by the Defendant in respect of the money; but in the result, the Plaintiff executed the deed without any consideration paid to him. The Defendant's agent had the money on her behalf, with instructions to pay it; he never discharged that duty, never paid the money, as he ought to have done; the duty remained unperformed, and the agency in respect of it continued. It is very clear that in fact the money was not paid. The

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case of the Defendant is, that she had reason to believe that it was paid, and that the reason being founded on the act of the Plaintiff in executing the deed and leaving it in the hands of *Yates*, he must be bound by it.

According to the statement of Mr. *Anthony Blaggrave*, he required proof that the consideration was paid; it certainly was his duty to do so: it was to be shewn that the money which, after the 11th of *August*, was in the hands of *Yates* as the agent of Mrs. *Blaggrave*, had become the money of the Plaintiff, or a debt due from *Yates* to the Plaintiff. Under the circumstances of this case, the mere possession of the deed cannot be relied on as affording conclusive evidence; and the proof with which *Anthony Blaggrave* was satisfied, consisted of the information of *Yates*, and the production of the deed, and of certain warrants of attorney without date or description of the parties named as attorneys.

In a defence founded upon an allegation that the Plaintiff has released or assigned his rights for a pecuniary consideration paid to him, it is incumbent on the Defendant to prove that the consideration was, in fact, paid.

It appears to me, that in a defence founded upon an allegation that the Plaintiff has released or assigned his rights for a pecuniary consideration paid to him, it is incumbent on the Defendant to prove that the consideration was, in fact, paid, and that in this case the proof has failed. It is not shewn that the money ever was in the hands of *Yates*, as agent for or on behalf of the Plaintiff.

It is to be regretted that the time when *Yates* returned from *Ireland* to *Bristol*, and the day on which his interview with *Anthony Blaggrave* took place, do not distinctly appear. It is sometimes stated that *Yates* was a fortnight in *Ireland*; Mrs. *Blaggrave* speaks of the interview, vaguely, as taking place in or soon after *November*; *Anthony Blaggrave* (who might have been expected to state the day accurately) says that it was in *November*,

*November*,

*November*, immediately after the return of *Yates*, but he does not specify the day; and I have, in vain, looked through the papers in the hope of finding some clear evidence of the day. Mrs. *Blagrave*, in her cross bill, says that, on the 3d day of *November*, *Yates* left *Ireland* and returned to *Bristol*; but I think that it would not be right to bind her by that statement: and if I had thought it necessary for the decision of this case to ascertain the day accurately, I must have directed an inquiry on the subject. The circumstances, however, are such that I think *Anthony Blagrave* must have known that the deed was executed by the Plaintiff before the day on which it was dated; and, assuming nothing with respect to the day on which the deed was produced, we have this state of things, that *Anthony Blagrave*, as the agent of his mother, in the month of *August*, confided to *Yates* a certain amount of her money, to be applied for her benefit on a future day, viz. on the 16th of the month of *November* following, that a deed is produced to him, executed by the Plaintiff previously, but dated on the 11th day of *November*, and acknowledging, in the present tense, the receipt of the money on or before the execution of the deed. The deed, being post-dated, could not be a plain expression of the truth on the day of execution. If the deed was produced to *Anthony Blagrave* before the 16th of *November*, it could not express the truth at the time of the production; but, passing that over as not being proved, there was not, as in the absence of payment there could not have been, any money receipt contemporaneous with the execution of the deed, and no other was required. How it was that Mr. *Anthony Blagrave* overlooked circumstances so well calculated to excite suspicion, it would be vain to conjecture. Whether, as Mrs. *Blagrave* says, he was ignorant that the annuity could not be redeemed at any time, or whether he so

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far trusted to *Yates*, as to think it immaterial when the deed was executed or when it bore date, and to take no notice of the want of date in the powers of attorney, or of the absence of any receipt except the acknowledgment in the deed, does not appear. It is plain that he must have trusted, in a great measure, to the mere word or statement of *Yates*, and that he was content with evidence that was not only insufficient, but was of such a nature as to excite very strong suspicion of the truth of the fact which ought to have been established; and, on the whole, I am of opinion, that, after the production and alleged delivery of the deed of release to *Anthony Blaggrave*, the redemption money remained in the hands of *Yates*, or due from him, as the agent of *Mrs. Blaggrave* and at her risk.

It therefore appears to me that the Plaintiff is entitled to relief; but, proceeding upon his statement of the notice, it is plain that *Mrs. Blaggrave* intended to redeem, and was entitled to redeem, the annuity on the 16th day of *November 1830*, and that the Plaintiff had consented to such redemption. He was entitled to the redemption money on that day; *Yates* had it as agent of the Defendant, and fraudulently withheld it. The Defendant is, I think, answerable for that—she cannot derive any benefit from the fraud of her own agent; but I do not think that she is answerable for the withdrawal of the notice which *Yates* affected to make, or that the Plaintiff is entitled to the benefit of such withdrawal.

I think therefore, on the whole, that the Plaintiff is entitled to the 2750*l.* which was due to him in respect of the annuity on the 16th day of *November 1830*, and that, in accounting for the money received by him from *Yates* in respect of the pretended continuance of the annuity,

annuity, he is entitled to interest on the sum of 2750*l.* at 5 per cent. If the parties differ, an account must be taken; and I think that the Plaintiff is entitled to the costs of this suit, and that, paying the costs of Sir *Richard Godin Simeon*, he is entitled to have them over against the Defendant *Mrs. Blaggrave*.

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TARBUCK *v.* WOODCOCK.

Nov. 24.  
Dec. 13.

THE MASTER *of the* ROLLS.

This suit has been prosecuted in the name of the Plaintiffs, by a solicitor whose name is on the proceedings in the usual course.

Services upon the solicitor whose name is on the proceedings are, by General Order (*a*), deemed to be good upon the party.

The Plaintiffs have denied that they ever gave the solicitor authority to institute or prosecute the proceedings on their behalf (*b*); and in this state of things the Defendant, being in a situation to move to dismiss the bill for want of prosecution, serves the notice of his mo-

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(*a*) 19th Order, 26th October      (*b*) See *ante*, p. 134.

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be dismissed as solicitor. Held, that no such order could be made, but personal service on the Plaintiffs of the notice of motion to dismiss was ordered. The Plaintiffs took no step to relieve themselves from their liability. Held, that the Defendant was entitled to have the bill dismissed, with costs to be paid by the Plaintiffs, leaving them to obtain, as against the solicitor, any remedy they might have.

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tion on the solicitor for the Plaintiffs, whose name is on the proceedings, but whose authority is denied.

The solicitor, being thus served, requests the Plaintiffs to appoint another solicitor to act for them; and this the Plaintiffs refuse to do, alleging, that as they never authorized the institution of the suit, they have no concern with it, and will not intervene.

On the motion to dismiss coming on to be heard, the solicitor, acting as such for the Plaintiffs, stated the fact, and the motion stood over, to give him the means of considering what steps he should adopt for his own protection.

He now moves that he may be dismissed as the solicitor for the Plaintiffs; and I am of opinion that no such order can be made.

At present, it is not known whether the solicitor has acted under the authority of the Plaintiffs or not.

If he has, the Plaintiffs are bound by the service on them, and the Defendant is entitled to an order on his motion.

If he has acted without authority, he is bound to indemnify the Plaintiffs; and he is, or may be, liable to the Defendant for the costs of the suit.

And in this state of things I can do nothing to relieve him from his liability.

The Plaintiffs ought to take the necessary steps to be relieved from their responsibility. If they will not, I must

must consider the case of the Defendant; and for his better security and protection, I think that I might order that services should be made, not as usual on the solicitor whose name is on the proceedings, but on the Plaintiffs personally, without prejudice to the question by whom any additional costs occasioned by the personal service should be borne.

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Notice having been served on the Plaintiffs personally,

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Mr. Pemberton Leigh now moved to dismiss the bill for want of prosecution, with costs.

Mr. Prior submitted that the dismissal should be made without costs as against the Plaintiff *Mrs. Hannah Tarbuck*, her name having been used without her sanction.

The Master of the Rolls. Having denied the solicitor's authority, notice of this motion was served on her personally: nothing has been done, and the bill must be dismissed on the usual terms. She must obtain from the solicitor any remedy she may be entitled to. (a)

(a) See *Wade v. Stanley*, 1 *Jac.* 6 *Beavan*, 251.; *Martindale v. & W.* p. 675.; *Hood v. Phillips*, *Martindale*, cited 1 *Smith's Pr.* 6 *Beavan*, 176.; *Ward v. Ward*, 172. (3d edit.)

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Nov. 15.

ST. VICTOR v. DEVEREUX.

An application for an order of course should state all the material facts. If there be any suppression, the order will be discharged, and the Court will not, on the application to discharge it, support it on the special merits then, for the first time, appearing.

A Plaintiff claiming partly under the heirs of a French subject, and, through an instrument of doubtful construction, obtained an order of course at the Rolls to sue *in formâ pauperis*, upon the simple allegation of his poverty. Held, that the order was irregular, on the ground of the suppression of the facts, which ought to have been presented for the consideration of the Court upon the application.

On an application to the Master of the Rolls in a Vice-Chancellor's cause, to discharge an order of course obtained at the Rolls, the Court will not enter into the merits further than is necessary to determine whether the order was regularly obtained

THIS was an application to discharge an order to sue *in formâ pauperis*, which had been obtained *ex parte* by the Plaintiff.

It appeared that three French ladies, named *Francault*, *De Montmignon* and *Golleville*, were entitled to charges on an estate in France belonging to *Fanning*, the son, an English subject. The estate had been confiscated by the Revolutionary Government, and the Plaintiff, who claimed under Mesdames *De Montmignon* and *Golleville*, and under the heirs of Madame *Francault*, sought, by this bill, to obtain payment of the charges out of a portion of the compensation fund, provided by the treaty of *Paris* for the indemnity of *British* subjects, who, in contravention of the treaty of commerce of 1786, had suffered by confiscation of their property (a), and which had been awarded to the Defendant.

The title of the Plaintiff depended on a French instrument, dated the 9th of *May* 1834, which, as set out in the bill, was to the following effect: (b) —

“ We, the undersigned creditors, by mortgage of *James R. T. Fanning*, the son,” &c., “ and we, the heirs and
 (a) See 59 *G. 3. c. 51.* (b) The translation was afterwards found to be inaccurate.

and heiresses of our deceased sister, aunt and great aunt, *M. F. C. H. L. D. de Francault*, also a creditor by mortgage of Mr. *James R. T. Fanning*, the son, declare altogether to have yielded to Mr. *J. B. St. Victor* our lawful power of procuration (he intervening and accepting), first, the third of the sum of 63,575 livres tournois, or francs, which we have lent to the said Mr. *Fanning* by our four contracts of the 19th of *October 1791*, and 4th of *June 1792*. Secondly, and moreover all interest which shall be recovered by him in the Court of Chancery in *London*. This cession is made to him, as well to indemnify him against the expenses he has already made to attain the recovery of the sums due to us by the said Monsieur *Fanning*, as to recompense him, on account of his long devotedness and his sacrifices for our late sister. We add, that even in case of death of one or several amongst us, we will, that Mr. *B. St. Victor* shall dispose, as of things belonging to him, of the sums we abandon to him, but subject to the charge of his making, or causing to be made, the advances deemed necessary to obtain the recovery thereof, our formal intention being, that nothing be demanded of us on that account. It is understood that we reserve to ourselves only the two-thirds of the capital of 63,575 francs above-mentioned, or the two-thirds of the capital which shall have been reserved in the Court of Chancery in *London*. The present declaration has for its object to confirm those made previously by us, and which are deposited in the office of Mr. *Toullandier*, ancient attorney, 18 St. *Benoit Street*, in *Paris*, and also to enable Mr. *Bourlon St. Victor* to procure, in *London*, upon the sums we abandon to him, upon those due to us by the estate of Mr. *Fanning* the son, the means which shall be necessary."

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The cause was attached to the Court of the Vice-Chancellor of *England*.

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The Plaintiff, upon an *ex parte* petition addressed to the Master of the Rolls, which stated merely, in the usual form, that he had filed his bill, and was a pauper, obtained from the Under Secretary an order to sue *in forma pauperis*.

Mr. *Pemberton Leigh* and Mr. *Beavan* now moved to discharge the order. They argued that the instrument was a mere power of attorney, authorising the Plaintiff to sue for other parties, he undertaking to pay the costs. That if it were considered an assignment, it was an assignment, partly from there representatives of Mad. *Francault* deceased, so that the Plaintiff, whether prosecuting the claim as attorney or assignee, was suing in a representative character, and was not, therefore, entitled to sue *in forma pauperis*; *Oldfield v. Cobbett* (a), *Paradice v. Sheppard*. (b) Secondly, that even if he was suing in a mixed character, a special, and not an *ex parte* application ought to have been made; *Thompson v. Thompson*.

(a) 2 *Beav.* 444., and 3 *Beav.* 432.

(b) 1 *Dick.* 136., and *Beames on Costs*, 252. (2d edit.)

The following note of the case of *Paradice v. Sheppard* is taken from the *Deaves MSS.* at the Rolls, page 99. :—

Paradice v. Sheppard, 3d December 1745.

The Master of the Rolls had admitted the Plaintiff, who was an administrator, to sue *in forma pauperis*. On motion, the Lord Chancellor discharged the order, and dispaupered him, —

1st. Because the stat. 11 *H.* 7. c. 12., which authorises the Court to admit parties to sue *in forma pauperis*, is penned much in the same words with the statutes concerning costs, which have

been held not to extend to actions by executors or administrators *in auctor droit*.

2dly. On search, no precedent could be found, either in Chancery or in the Courts of Common Law, of admitting an executor or administrator to sue or defend *in forma pauperis*.

3dly. The form of the affidavit usually made is not applied to this case, for the party may with truth swear that he is not worth 5*l.* over and above what will pay all his just debts, and yet may have considerable assets of his testator's or interatee's, out of which he may be entitled to retain or be allowed the costs of suit.

Administrator dispaupered.

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An administrator having been admitted at the Rolls to sue *in forma pauperis*, the order was discharged by Lord Hardwicke.

Thompson. (a) That, at all events, the special circumstances ought to have been stated for the consideration of the Court, on the Plaintiff's petition, and that the suppression alone was a sufficient ground to discharge the order.

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[*Mr. G. Turner, as amicus curiae*, stated a case in the Exchequer, wherein he had been concerned for the Plaintiff, in which the assignee from a clergyman of *Easter* offerings had instituted a suit for their recovery; having obtained an order to sue *in forma pauperis*, the Chief Baron *Alexander*, on the motion of Mr. *Hayter*, discharged it.]

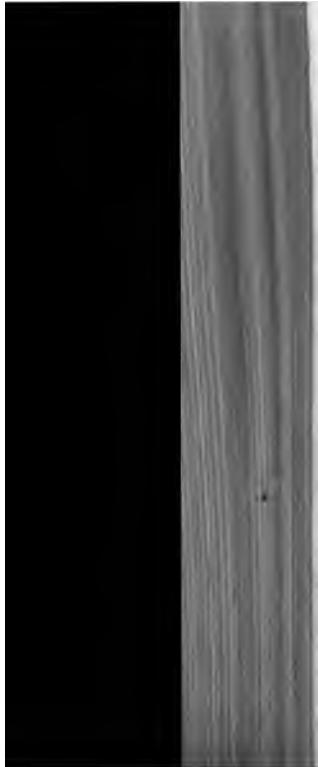
Mr. W. Lee, contra, argued that the Plaintiff was suing in his own right as assignee of a *chose* in action, and not in a representative character; that the Defendant had been guilty of such delay in making this application that it ought to prevent the discharge of this order.

The MASTER of the ROLLS.

I can only attend to the question of regularity or irregularity. It is stated that this order was obtained on the common statement and affidavit. In order to obtain it regularly there ought to have been a statement of the special circumstances. If they had been stated, the Plaintiff would not have obtained the order of course, but would have been obliged to make a special application, not here, but to the Vice-Chancellor of *England*, to whose Court the cause is attached. The question to consider is, whether the order obtained on the common affidavit, and without a statement of the special circumstances, is regular. That depends on the

construction

(a) 1 *Turn. & Ven. Ch. Pr.* (6th ed.) 515, cited 1 *Daniel's Practice*, 42.



course irregular, it will then be
Plaintiff to get the proper and
Vice-Chancellor of *England*.

Mr. Lee. Even if this order be
still the facts, as they now appear
order, and it may therefore be so

The MASTER of the ROLLS.

I cannot agree with you in
things more important than the
orders of course should fairly stand
which really ought to be consistent
allegations made upon petitions for
such orders are made, and if the
thing material, and which ought
sideration, the order so obtained

In this case the order was on
and common allegation of the
tiff, and nothing more; if this had
he was suing in his own right,
been quite regularly obtained: but

the Court, whether, under the circumstances, he was entitled to sue *in forma pauperis* or not, then those matters ought to have been adverted to in his application. If that had been done, then, beyond all doubt, the order would have been refused in the Secretary's office, and it would have required a special application to the Court, on which the merits would have been taken into consideration; if he then appeared entitled to sue as a pauper, the proper order would have been made to admit him to sue *in forma pauperis*.

Lord Cottenham laid down the rule, that when an application was made to discharge an order of course for irregularity, he would not, under any circumstances, support it as a special order, but would discharge such order of course, giving the party the opportunity of regularly obtaining an order, upon a proper application for the purpose; such has ever since been the practice of this Court. (a)

If the real merits of the case, or any questions arising on instruments or on the nature of the Plaintiff's interest, are to be determined, that must be done in the Court to which the cause is attached. Certainly I have no authority, in a cause not attached to this Court, to take those matters into my consideration, further than for the purpose of ascertaining whether such a question arises upon them, as to make it material to have the special matter considered, before granting an order to admit a party to sue *in forma pauperis*.

I think that, in this case, the special circumstances ought to have been alluded to, upon the application for the

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(a) See *Harris v. Start*, 4 *Myl. Beav.* 297., and *Brooks v. Pur-*
& C. 261.; *Grove v. Sansom*, 1 *ton*, 4 *Beav.* 494.

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the pauper order, and not having been mentioned, it appears to me that this order was irregular. To discharge an order for irregularity would discharge it with costs, but it may be material to consider what has happened since the order was obtained.

Mr. Pemberton Leigh. We do not ask for costs.

The Master of the Rolls.

The circumstances are such, that I think I must have refused them. I must discharge the order without costs, and it will be quite open to the Plaintiff to apply to the Vice-Chancellor of *England* on the merits.

Nov. 19.

PATERSON v. LONG. (a)

Two houses, held under one lease, were sold separately to *A.* and *B.* The lease was produced and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent be-

*T*WO houses were held under one lease from the Marquis of *Westminster*, at a ground-rent of 8*l.* The lease contained covenants to pay the rent, to keep insured, &c., and a proviso for re-entry on non-performance of any of the covenants. The property having become vested in the Plaintiff, as executor, he put the two leasehold houses up for sale in separate lots. The particulars of sale, after stating the

(a) Reported on another point, 5 *Beav.* 186.

between the two purchasers, but did not notice covenants to insure, &c., and a proviso for re-entry on non-performance, contained in the lease. Held, that though *A.* might be evicted by the default of *B.*, still he was, under the circumstances, bound to complete.

Observations on special conditions of sale.

the property as "a leasehold estate held under the Marquis of *Westminster* for a term of years, at a ground-rent," and, after describing Lot 1., proceeded, "Held on lease from the Marquis of *Westminster*, with Lot 2., for a term of ninety-one years from *Lady-day* 1832, at a ground-rent of 8*l.* This lot will be sold subject to the payment of 4*l.* per annum."

The particulars, after describing Lot 2. as similar to Lot 1., proceeded, "Held on lease with Lot 1., as above. This lot will be sold subject to the payment of 4*l.* per annum." The particulars also stated as follows: "The original lease, or abstracts thereof," &c., "will be produced at the time of sale."

The seventh condition provided that the production of the last receipt for rents should be accepted "as evidence of the due performance of all the covenants, clauses, and agreements contained in the original lease."

The eighth condition of sale provided that the purchasers of the two lots, (unless one purchaser should purchase both lots), should be parties to each other's assignment, and covenant to pay the proportion of rent allotted to each, and to indemnify each other against the same; and also give mutual powers of distress and entry upon and over the premises purchased by each, as an indemnity against the payment of more than the due proportion of the original rent of 8*l.*, payable by each purchaser; and that such last-mentioned purchaser or purchasers should, at his or her own expense, execute a bond, in the penalty of 1000*l.*, to the vendor, to indemnify him and the estate of his testator against the rent and *covenants* in the original lease, as is usual in such cases.

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The two lots were sold to different purchasers, and the Defendant *Long* became the purchaser of Lot 1. He objected to the title, on the ground that the two houses, being held under one lease, he would be liable to eviction by the ground landlord, upon any default being made by the purchaser of the other lot in performing the covenants of the original lease.

The Plaintiff filed his bill for specific performance, alleging that the Defendant had notice, and must be presumed to have had notice, of the stipulations contained in the original lease, and had purchased lot No. 1. subject thereto.

The Defendant, by his answer, admitted that the lease had been produced at the sale, and had been inspected by his solicitor, but he denied, save as aforesaid, that he had, and he submitted whether he was to be considered as thereby having, or must thereby or otherwise be presumed to have had, notice of the stipulations contained in the original lease from the Marquis of *Westminster*.

By the decree made at the original hearing, it was referred to the Master to inquire, whether a good title could be made to the premises in question in this cause purchased by the Defendant (having regard to the particulars and conditions of sale).

The Master reported that a good title could not be made; and in his written opinion he said, he thought that the Defendant had a right to be indemnified against the consequence that might ensue from a breach of those covenants by the owner of the premises in lot 2., and that the notice that the premises in lots 1. and 2.

were

were held under the same lease was not sufficient to release the vendor from giving the indemnity. The Master added, that whether the purchaser had, by reading the original lease and therefore ascertaining to what covenants the original lessee was liable, waived or abandoned his right to be indemnified, was a question for the Court and not for him to decide.

The Plaintiff excepted to this report, and the cause was also brought on for further directions.

Mr. *Pemberton Leigh* and Mr. *Beavan* for the Plaintiff.

The Defendant had both constructive and actual notice of the contents of the lease when he became the purchaser. Notice to a purchaser of a lease is notice of its contents; *Hall v. Smith.* (a) This case is precisely similar to *Walter v. Maunde* (b), in which it was decided, "that a person contracting to purchase leasehold property is held to contract with notice of the clauses in the lease." The principle has been followed in the subsequent cases. In *Cosser v. Collinge* (c) Sir *C. C. Pepys* says, "Prima facie a man who agrees to take an underlease must know that he is to be bound by all the covenants contained in the original lease." In that case Mr. *Watson*, the solicitor of a party who had agreed to take an underlease, had "cursorily examined" the original lease; and on this the late Master of the Rolls observed, "I am clearly of opinion that Mr. *Watson* had either actual or constructive notice, because the deeds were brought to him, for the purpose of ascertaining what, if he had used due diligence, he must have discovered.

(a) 14 *Ves.* 426., and see *Taylor v. Stibbert*, 2 *Ves.* jun. 437. (b) 1 *Jac. & W.* 181.
441., and *Daniels v. Davison*, 16 *Ves.* 249., and 17 *Ves.* 433. (c) 3 *Myl. & K.* 283.

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discovered. The Plaintiff, therefore, is entitled to the specific performance which he asks; and as I think Mr. *Watson* might, with due diligence, have discovered what the covenants in the leases were, he is entitled to that specific performance, with costs." Again, in *Pope v. Garland* (a) it was held, that upon the sale of leasehold property it is the duty of the purchaser to inquire into the covenants and stipulations of the original lease.

In this case, however, it is unnecessary to refer to the doctrine of constructive notice. Here it is admitted that the lease was produced, and that the Defendant's solicitor inspected it; the Defendant, therefore, had notice of the whole contents, and became aware of the nature of the several covenants and the means reserved by the ground landlord for enforcing them.

If the two purchasers are entitled to an indemnity, it must be an indemnity implied by law, as between themselves, in the same way, as a purchaser of an equity of redemption is under an implied obligation to indemnify the vendor against the payment of the mortgage (b), or as the purchaser of a leasehold is bound to indemnify the vendor against the payment of rent and performance of covenants. (c) This, then, would be matter of conveyance and not of title.

Mr. *Turner* and Mr. *Follett*, *contrâ*. The Plaintiff has not shewn a good title to this property. The purchaser is entitled to a secure title for the term which he has contracted to purchase; but if he be compelled to accept this title, he will be liable to eviction without any default

(a) 4 *Y. & Coll. (Exch.)* 594. (c) *Staines v. Morris*, 1 *F. & B.*

(b) *Waring v. Ward*, 7 *Ves. & B. 8.*

p. 336., and *Jones v. Kearney*,  
 1 *Dr. & War.* 134.

default of his own, in case the purchaser of the other lot should neglect to perform the covenants to insure, &c. These being covenants against fire, &c., against the consequences of a non-performance of which this Court will not relieve (a), a forfeiture might take place the very day after the purchase, through the default of the purchaser of lot 2. In *Fildes v. Hooker* (b) the Plaintiff had agreed to grant a lease for twenty-one years: it turned out that the Plaintiff himself held under a lease, and was subject to a proviso for re-entry upon non-performance of the covenants, and therefore could not give to the Defendant a secure lease for the term of his contract; it was decided that he could not compel the Defendant to take the title, even with an indemnity.

In *Flight v. Booth* (c) the particulars stated that no *offensive* trade was to be carried on upon the premises; but the original lease appeared to prohibit other trades, which were not offensive, and it was held that, on account of the discrepancy between the particulars and the lease, the purchaser was entitled to rescind the contract.

The Plaintiff has acted with such a degree of carelessness as to disqualify himself from enforcing this contract. He was well aware of the objection to the title, and making a provision as to the severance of the rent, he wholly omitted all mention of the proviso for re-entry. The Plaintiff, therefore, was justified in assuming, and did assume, either that there were no other objections to the title than those specially provided for, or that the ground landlord would join and sever the joint liability. The courts will not assist a party who has, even

(a) See *White v. Warner*, 2 *Mer.* 424., and 3 *Mad. Mer.* 459.

193.

(c) 1 *Bing. N. C.* 370.

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even inadvertently or by negligence, misled a purchaser, and they require that special conditions of sale should be expressed in the most clear and unambiguous terms; *Southby v. Hutt* (a), *Symons v. James* (b), *Taylor v. Martindale*. (c) "If there is misrepresentation, so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor in such case is bound by that misrepresentation;" *Pope v. Garland*. (d)

Mr. *Pemberton Leigh*, in reply. It is impossible that a purchaser could have believed that the Marquis of *Westminster*, who was no party to the contract, would have joined in the conveyance; such is not the usual course. The provision for giving to the vendor a bond for the due performance of the *covenants*, shews that there were *other covenants*, and that they were to continue. The real intention was to apportion the permanent charge, viz. the rent, between the purchasers, and to leave the contingent liabilities as they were.

Fildes v. Hooker does not apply; that was not a case of a contract to sell a leasehold interest as it existed, but an unrestricted agreement to grant a valid lease for twenty-one years. Here the Plaintiff has not contracted to make out a title for ninety-nine years, but to sell the leasehold interest which he is entitled to, together with another house, under one lease from the Marquis of *Westminster*.

The MASTER of the ROLLS.

Many inconveniences necessarily arise, when leaseholds consisting of several houses held under the same lease

(a) 2 *Myl. & Cr.* 207.

(c) *Ib.* 658.

(b) 1 *Y. & C. (C. C.)* 487.

(d) 4 *Y. & C. (Exe.)* p. 401.

lease are sold in several lots to distinct purchasers; for if the lease, as must be expected, contains covenants affecting the whole, and a proviso that on breach of any covenant, the landlord is to have a right to re-enter, it is evident that the purchaser of one lot may be evicted, without any default of his own part, but solely through the default of another purchaser. This is certainly a very inconvenient state of circumstances, and the question whether a purchaser is to be compelled to complete his purchase depends upon the nature of the contract, what he has agreed to buy, and under what circumstances.

This was an agreement to purchase an existing leasehold interest; and the distinction is important, that it was not an agreement to purchase an absolute interest to endure for a certain number of years, but to purchase "a leasehold estate held under the Marquis of *Westminster* for a term of years." The leasehold interest was to be sold in two lots, though held under one lease. It is expressly stated in the particulars of sale, that lot 1. was "held on lease from the Marquis of *Westminster* with lot 2.," and that lot 2. was "held on lease with lot 1. as above," and at the foot of the particulars it was stated, "that the original lease would be produced at the time of the sale."

The lease was produced, and was inspected by the solicitor of the gentleman about to purchase. This is admitted. The whole interest possessed being the whole subject of the sale described, there could not, after the inspection, be the slightest doubt of what was intended. The Defendant purchased the leasehold interest; and he now says that there is in the particulars and conditions, expressions which operate as a misrepresentation. It is not imputed that there is any fraud,

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but it is said that the purchaser was deluded and lulled by these conditions of sale; that the leaseholds were held under one rent, and were subject to covenants of a special nature, as covenants to insure, not to permit noisome trades to be carried on upon the premises, &c., and on breach of any of which covenants, a right of re-entry was reserved to the lessor, yet it was merely stated that lot 1. was to be sold subject to a ground rent of 4*l.*

The whole being held under a rent of 8*l.*, it was necessary to make an arrangement for the apportionment, and it was provided for by the conditions. Again, it was necessary to shew that there was then a good title, which would not have been the case if there had been a breach of covenant, and a right of re-entry had accrued to the landlord, and provision was made for that; for the seventh condition provides that the production of the receipts should be evidence of the performance of all the *covenants*. This therefore is guarded against.

The eighth contains this, "that the purchaser shall execute a bond in the penalty of 1000*l.* to the vendor, to indemnify him and the estate of his testator against the rent and covenants in the original lease, as is usual in such cases." Surely, if, on the sale of the leasehold interest, the lease was produced, and the purchasers were told that they must indemnify each other as against the apportioned rent, and the landlord as against "rent and *covenants*," it cannot be said either that the party was not aware of what he was doing, or that it was intended that the landlord was to release the covenants. This condition implies unavoidably that the covenants were to be continued in force.

In this state of things the purchaser says, I ought to be indemnified, because I had a right to assume that
the

the landlord would join in releasing or in apportioning the covenants. I do not think there is any ground for that assumption; there may be great inconvenience, but the purchaser contracted subject to it. I may also observe that the purchaser of lot 2. has as great an interest in preventing a forfeiture as the purchaser of lot 1.

The exception must be allowed, and there must be a decree for specific performance with costs.

I quite agree with the observations which have been made on special conditions of sale; and I think that equity, nay common honesty, requires, that conditions of sale should fairly represent the real situation of the property. (a)

(a) See *Hyde v. Dallasay*, 4 *Brow.* p. 608., and the cases there cited.

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## WEDGWOOD v. ADAMS.

In cases of specific performance, courts of equity exercise a discretion. In cases of great hardship, they will not interfere, but will leave the Plaintiff to his remedy by recovery of damages at law.

Trustees joined their *cestui que trust* in a contract for sale, and personally agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear whether the purchase money would be sufficient to discharge them, or what would be the extent of the deficiency. The Court refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages.

THIS was a bill filed by a purchaser for the specific performance of a contract.

In February 1838, *Ann Parry* and *William Edwards Parry*, being entitled to some real estate, which was then subject to certain incumbrances, conveyed it to three trustees, *Adams*, *Leach*, and *Paynter*, on trust to sell, and apply the produce in payment of the mortgages and incumbrances thereon, and then in payment of the scheduled debts of the grantors, due on judgment, bond, and otherwise, and afterwards of the costs, charges, and expenses of the trustees, and then to pay off all sums of money raised and advanced under the powers contained in the settlement made on the marriage of *William Edwards Parry* and *Martha* his wife; and also in payment to the said *Ann Parry* of such sum as would be sufficient to purchase an annuity or clear yearly sum of 100*l.* for the life of the said *Ann Parry*, and then upon trust, to pay the residue or surplus of the monies to arise from the intended sale or sales unto *Ann Parry* and *William Edwards Parry*, in such proportions as *Adams*, *Leach*, and *Paynter* should appoint and determine.

In May 1838, the three trustees and *Ann Parry* and *William Edwards Parry* entered into a contract in writing, for the sale to the Plaintiff, *Colonel Wedgwood*, of part of the property. The agreement was expressed to be made

made between *Adams*, *Leach*, and *Paynter* (as trustees for *Ann Parry* and *William Edwards Parry*), and *Ann Parry* and *William Edwards Parry* on the one part, and the Plaintiff of the other part, and thereby, the former agreed to sell to the latter the property in question for 5600*l.*; and the parties of the first part agreed, on receipt of the purchase-money, that they, and all other persons having any estate or interest therein, would convey the property to the Plaintiff. The agreement then proceeded as follows:—"And it is hereby agreed, that if any part of the said premises be subject to an incumbrance, the same shall, if required by the said *T. J. Wedgwood*, be exonerated by the said *J. Adams*, *Francis G. Leach*, *W. E. Paynter*, *Ann Parry*, and *William E. Parry*, and the estate vested in them, previously to the surrender or other conveyance to the said *T. J. Wedgwood*."

The property was, at the time, subject to certain incumbrances, the amount of which had not, at the original hearing, been ascertained. All the Defendants appeared and answered the bill; but the two *Parrys* and *Paynter* having made default in appearing at the hearing, the Plaintiff took a decree against them by default, and it was referred to the Master to ascertain the value of the property comprised in the indenture of *February 1838*, and the incumbrances thereon.

By the Master's report, it appeared that the monies receivable from the whole of the property, if sold, would be less than the amount of the existing incumbrances thereon, and the amount of the deficiency was a subject of dispute between the parties. *Adams* and *Leach* had not had notice of some of the incumbrances till after the institution of the suit.

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The cause having come on for further directions,

Mr. *Kindersley* and Mr. *Parry* for the Plaintiff, asked for a decree against the trustees for the specific performance of the contract entered into by them, and a direction for them to exonerate the estate according to the express terms of the contract.

Mr. *Pemberton Leigh*, Mr. *Turner*, and Mr. *Edgar Montagu* for the Defendants, the trustees.

In cases of specific performances, the courts of equity exercise a discretion, and will not interfere if the circumstances of the case make it unreasonable so to do. They will not execute a contract which unfairly presses on one of the parties. Thus a mortgagor who contracts to grant a lease, will not be decreed to pay off the mortgage, in order to enable him to complete the contract; *Costigan v. Hastler* (a), the lessee will be left to his remedy at law. So where a tenant for life, who, upon the settlement by him of lands of equal value, was absolutely entitled to the settled estates, entered into a contract for the sale of them, the Court declined ordering him to procure and settle lands of equal value, in order to complete his contract, *Howell v. George* (b); and in *Malins v. Freeman* (c), the Court declined to interfere, where, by mistake, a party had, at an auction, bid for and purchased the wrong lot. Here the trustees, having no personal interest, have, improvidently and without knowing the state of the incumbrances, contracted to exonerate the estate from them: there is no knowing the extent of their liability if they are compelled specifically to perform the contract. This is a proper case for damages at law.

Mr.

(a) 2 *Sch. & Lef.* 160.

(c) 2 *Keen*, 25.

(b) 1 *Mad.* 1.

Mr. *Kindersley* in reply.

The MASTER of the ROLLS.

The question is simply this, whether the trustees, who entered into this contract, are personally liable to exonerate the purchased estate from the incumbrances which affect it, and whether they are to be compelled specifically to perform the contract which they have entered into.

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The first question argued is as to the meaning of the contract. It appears that *Ann Parry* and *W. E. Parry*, the owners of the estate in question, were indebted apparently to a large amount, and they conveyed the estate to three trustees, in order that it might be sold. The contract was entered into by the three trustees and by the two persons beneficially interested in the estate. The duties to be performed by the trustees and the beneficial owners were, as in all ordinary cases, very distinct. The trustees were to perform the duties belonging to their trust, and the beneficial owners were to perform every duty attached to the property. This being the situation of the parties, it is, in the commencement of the contract, carefully stated that the three trustees were trustees of the estates of the other parties to the contract, and it is also expressly stated that they entered into the contract *as trustees*. In the course, however, of the same contract, the trustees and the beneficial owners are joined together in the same agreement, that is, they all agree, without any distinction, that there shall be a clear title made out at their expense, that the estate shall be conveyed or surrendered free from incumbrance, and that there shall be covenants for quiet enjoyment, and so on; and then follows another and distinct agreement, that if there shall be any

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any incumbrance on the property, it shall be exonerated by the five persons named, viz. by the trustees and the beneficial owners, and that the estate shall be vested in them prior to the conveyance.

On the construction of the contract, I am inclined to think that its effect is to create a personal obligation in the trustees, but I can hardly believe that this effect could have been known to the parties at the time. It is to me extraordinary, that trustees who had no interest whatever in the matter, should knowingly enter into a personal obligation to exonerate the trust estate from every incumbrance that might affect it. It seems to me equally extraordinary, that a purchaser who intended to rely on the personal liability of the trustees should not have taken care to have that distinctly stated, and to distinguish the trustees from the persons beneficially interested, and not confound them in the same agreement, as seems to have been done here.

I conceive this to be an ill-drawn contract : the effect may however be that contended for by the Plaintiff. Suppose it to be so, the question then arises, whether, under the circumstances, it is a fit contract to be specifically performed. One of the questions raised is, that the obligation is not formally enough insisted upon in the pleadings; but I think that a Plaintiff is not obliged to state each particular portion of the contract which he calls upon the party to perform, and that when he asks for a specific performance, a specific performance of every thing in the contract is implied.

That being so, the question is, whether the contract is of such a nature, as, under the circumstances, the Court will decree a specific performance ? Now I would rather, before I decide that question, look at the

cases

cases which have been cited on the subject; but with reference to the last argument used, viz. the difficulty of determining what sum would be unreasonable to compel the trustees to pay, and at what amount the Court would stop; I conceive the doctrine of the Court to be this, that the Court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more or less reasonable, is not a thing that you can define, it must depend on the circumstances of each particular case. The Court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the Plaintiff to his legal remedy by recovery of damages.

There would be great inconvenience either way in this case. By this contract, Colonel *Wedgwood* was to have possession of the estate five years ago. He has had possession, and certainly cannot now be deprived of the benefit of this contract without very great inconvenience. On the other hand, if these Defendants are called on to perform the contract in the way here asked, what means have I of measuring the inconvenience to which they will be subject? I have statements on both sides as to the accounts and charges, but I can form no opinion whatever as to what may be the result from the Master's report, on which, I find it in great controversy between the parties, whether the whole purchase

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chase money of the estate will or will not discharge the incumbrances. I must, therefore, look at it in this light, that it may not be sufficient; and if so, I have no measure of the extent to which the purchase-money may be deficient. It may be 200*l.*, 300*l.*, or 500*l.*, and for any thing I know, it may be 5000*l.*

I will not decide the question at this moment, as I wish to look at the cases: I will mention it again.

Nov. 24.

The MASTER of the ROLLS.

In this case, I have looked over the papers, and I think that the contract is not at all less extraordinary than the trust deed, which is a deed for the payment of every sort of claim before even the costs and expenses of the deed.

However, after consideration, I think I cannot order a specific performance of that agreement; and with regard to its being a mere money objection, I could not, when this case was argued, call distinctly to my mind a case of that sort, of which I had some recollection, and which came before Lord *Hardwicke*. It is a case not actually reported, but it is cited in the argument. (a) There, a person being entitled to a small estate under the will of his father, on condition that if he sold it within twenty-five years, half the purchase money should go to his brother, sold it within the time, and the question was whether that agreement should be specifically performed; Lord *Hardwicke* thought not, because, by the specific performance of it he would lose half the purchase money.

(a) In *Ramsden v. Hyton*, 2 *Ves. sen.* p. 307.

money. I think that came very nearly to a case of mere pecuniary objection.

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I cannot decree a specific performance, and it is for the Plaintiff therefore to consider what he will do.

NOTE.—The bill was afterwards dismissed without costs, November 1844. See *post*.

JACKLIN *v.* WILKINS.

Dec. 18.

ATHER the Defendant had been served with a sub-
pœna, but before he had appeared and before the time for appearance had expired, the Plaintiff, without any special leave of the Court, gave the Defendant notice of motion for an injunction.

A Plaintiff cannot, before appearance serve a notice of motion on the Defendant, without first obtaining the special leave of the Court; and the notice of motion should state that such leave has been given.

The defendant did not appear upon the motion.

The MASTER of the ROLLS having intimated that he thought the proceeding irregular.

Mr. Schomberg, in support of the motion, argued as follows:—

Formerly it was necessary to serve the Six Clerk with all notices of motion; until appearance the Defendant had not appointed one, and it was therefore of necessity that the Court should be applied to for the purpose of allowing the notice to be served personally: but the office of Six Clerk has been abolished, and now by the new

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~~~~~  
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new Orders of *October 1842* (*a*), the parties themselves and their attorneys may be served with notice of all applications; it is therefore no longer necessary to obtain special leave to serve them.

*The MASTER of the ROLLS* said there had been no alteration in the practice in this respect. That special leave ought to have been obtained, and that the fact should have been stated in the notice of motion. (*b*)

Mr. Schomberg then proposed to move *ex parte*; but

*The MASTER of the ROLLS* said that, after the delay which had taken place, such a course could not be permitted.

(*a*) *Ord. Can.* 214, 215.

(*b*) *Hill v. Rimell*, 8 *Simp.* 632.

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NOTE. — See *Ramsbottom v. Freeman*, 4 *Beavan*, 145.

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AN  
INDEX  
TO  
THE PRINCIPAL MATTERS.

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ABATEMENT OF PURCHASE-MONEY.

*See VENDOR AND PURCHASER*, 4.

default, over. Held, that *A.* took an absolute interest. *Jordan v. Lowe.* Page 350

ABSOLUTE INTEREST.

1. A testator gave a fund, subject to the life interest of his wife, to *A.*, *B.*, and *C.*, equally to be divided between them; "but in case of the decease of *C.* without leaving lawful issue," he gave her one third between *A.* and *B.* Held, that upon the decease of the wife, *C.*, who was then living, became absolutely entitled to one third of the fund. *Barker v. Cocks.* Page 82

2. Devise of leaseholds on trust for *A.* for life, and afterwards to his issue male severally and respectively, according to their seniorities, and in default to his heirs according to their seniorities, and in

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ACCOUNT.

1. Where a bill for an account which relies on certain items as the ground for transferring the matter from the jurisdiction of a court of law to that of equity, also contains a general vague charge of there being voluminous and intricate accounts between the parties; then, if the Plaintiff fails in supporting his equity upon the particular items, he cannot maintain the bill against a demurrer upon the latter vague charges. *Darthez v. Clemens.* 165

2. A husband carried on the business of a victualler with stock, &c. which formed the separate estate of the wife; in carrying on the business he disposed of the

Ss consumable

consumable stock, and substituted similar articles, and at a subsequent period he sold the stock and business. By the decree an account was directed against the husband of the stock comprised in the settlement and sold. Held, that the Master properly included the substituted stock in the account. *England v. Downs.*

Page 269

3. In charity informations, the account is sometimes carried back to the date of the report of the charity commissioners, sometimes it is directed from the filing the information, and sometimes from the decree, according to the circumstances of each case. *The Attorney-General v. The Drapers' Company.* 382

4. Partnership accounts having been directed to be taken by the Master, in a case in which some of the books had been lost, the Court directed the Master, if it should appear in taking the account that any necessary books, &c. should be wanting, to report the same specially; and whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts. *Millar v. Craig.* 433

*See MORTGAGOR AND MORTGAGEE,*  
2, 3.

*PLEADING,* 6.

#### ACQUIESCEENCE.

*See TRUST,* 1.

#### ACTION AT LAW.

A motion being made for an injunction, it stood over with liberty to the Plaintiff to bring an action to establish his right. The Plaintiff neglecting to proceed therein, the motion was refused with costs. *Perry v. Truefitt.* Page 418

#### ADMINISTRATION BOND.

Where no proceedings have been taken to put an administration bond in suit, a sum due from the administrator at his death to the estate of the intestate, is not a specialty debt. *Parker v. Young.* 261

#### ADMINISTRATION SUIT.

- Under a decree in an administration suit, certain parties only were allowed to attend before the Master. The Master approved of some suits being instituted by the receiver, who was to be indemnified out of the estate. The funds appearing by affidavit to be "abundantly ample," the Court ordered the institution of the suits, and the payment of costs out of the fund standing to the general credit of the cause, upon service on those only whom the Master had authorized to attend him on the reference. *Lockhart v. Hardy.* 267
- After an estate has been fully administered in this Court, the executor

executor will not be permitted without the leave of the Court, to prosecute an action to recover part of the testator's property from a party to the suit. *Oldfield v. Cobbett.* Page 515

#### ADMINISTRATOR.

*See ADMINISTRATION BOND.*

#### ADVERSE POSSESSION.

Trustees, with the consent of *A. B.*, the tenant for life, had a power to sell the trust estate, and invest the produce in other real estate. In 1810, *A. B.*, with the concurrence of the trustees, sold the estate for 8440*l.*, and received the purchase money. About the same time (but whether with the concurrence of the trustees was not proved), *A. B.* purchased another estate for 17,400*l.* Of the 8440*l.*, 8124*l.* was paid by *A. B.* in part payment for the second estate; the remainder was paid partly out of *A. B.*'s monies, and partly by money raised by a mortgage of the estate. The estate was conveyed to *A. B.* in fee. No acknowledgment or declaration of trust was ever made by *A. B.*, and he retained possession of the estate till thirty years after, when he became bankrupt. The Court, against *A. B.*'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, and held that there had been no such adverse possession,

and no such acquiescence on the part of the trustees, as to preclude the Court making a declaration that they had a lien on the estate to the extent of the trust monies invested in its purchase. *Price v. Blakemore.* Page 507

#### AFFIDAVITS.

A motion for an injunction and receiver being brought on, stood over at the request of the Defendant, who filed his answer the next day. Held, that the Plaintiff might use affidavits subsequently filed, in contradiction to the answer, and which, under these circumstances, must be treated as an affidavit. *Gibson v. Nicol.* 422

#### AGENT.

The Defendant, through the agency of one *Yates*, granted to the Plaintiff an annuity, redeemable on six months' notice. In May 1830, notice was given to repurchase in November, and in August 1830, the Defendant entrusted *Yates* with the money for the repurchase. In October, *Yates* prevailed on the Plaintiff to execute the deed of re-assignment, dated in November, and indorsed on the annuity deed, without receiving the repurchase money, but the Plaintiff did not sign any receipt for the money. *Yates* afterwards produced the deed to the son of the Defendant, to satisfy him of the payment,

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payment, and it was handed back to *Yates* to be kept by him, with the Defendant's other documents. *Yates* acted in the transaction as agent of both parties. He retained the money, and to deceive both, continued the payment of the annuity, but afterwards died insolvent. The Defendant subsequently obtained possession of the deed. Held, under the circumstances, that the Defendant was not discharged, but was bound to pay to the Plaintiff the repurchase money with interest from *November 1890*, the Plaintiff accounting for the subsequent receipts of the annuity. *Vandaleur v. Blaggrave*. Page 565

*See PRODUCTION OF DOCUMENTS, 3.*

#### ALLEGIANCE.

1. Discussion of the question whether a sovereign prince is liable to the jurisdiction of the courts of a foreign country, in which he happens to be resident, and as to the liability to suit of one who unites in himself the characters both of an independent foreign sovereign and a subject. *The Duke of Brunswick v. The King of Hanover*.

1.

2. A sovereign prince, resident in the dominions of another, is ordinarily exempt from the jurisdiction of the courts there. *Ibid.*

3. A foreign sovereign may sue in this country, both at law and in equity; and, if he sues in equity, he submits himself to the juris-

diction, and a cross bill may be filed against him, which he must answer on oath; but a foreign sovereign does not, by filing a bill in Chancery against *A.*, make himself liable to be sued in that court for an independent matter by *B. The Duke of Brunswick v. The King of Hanover*. Page 1

4. The King of Hanover after his accession, renewed his oath of allegiance, to the Queen of *England*, and claimed the rights of an *English* peer: Held, that he was exempt from the jurisdiction of the *English* courts for acts done by him as a sovereign prince, but was liable to be sued in those courts in respect of matters done by him as a subject. Held also, that the sovereign character prevailed where the acts were done abroad, and also where it was doubtful in which of the two characters they had been done. *Ibid.*

*See FOREIGN LAW, 2.*

#### ALLOWANCE.

*See EXECUTOR, 1.*

#### ALTERNATIVE RELIEF.

*See PLEADING, 6.*

#### AMENDMENT.

1. A Plaintiff does not, by obtaining an order to amend, between the time of giving notice of a motion for the production of documents and its being heard, deprive himself of his right to their production. *Chidwick v. Prebble*. 264

2. Where

2. Where the bill is amended before answer, it is not necessary to serve a *subpæna* to answer the amendments. *Stanley v. Bond.*

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*See ANSWER*, 1.

**INJUNCTION**, 6.

**IRREGULARITY**, 2.

**STATE OF FACTS.**

**ANNUITY.**

*See DOUBLE AGENCY.*

**FRAUD**, 2.

**ANSWER.**

1. Where a bill is amended before answer, the Defendant is not entitled to eight weeks from the amendment to answer it. *Stanley v. Bond.* 420

2. A motion for an injunction and receiver being brought on, stood over at the request of the Defendant, who filed his answer the next day. Held, that the Plaintiff might use affidavits subsequently filed, in contradiction to the answer, and which, under these circumstances, must be treated as an affidavit. *Gibson v. Nicol.* 422

3. A Defendant put in an insufficient answer; the Plaintiff obtained an order to amend, and that the Defendant might answer the exceptions and amendments together. Held, that the Defendant's answer to the amended bill was to be deemed sufficient at the end of two months, under the 4th Order of April 1828, and not at

the end of three weeks under the 6th amended Order of April 1828.

*Lloyd v. Clark.* Page 467

*See GAMING.*

**IMPERTINENCE.**

**PROLIXITY.**

**APPEARANCE.**

Privileged Defendant who had appeared, held not to have waived his right to insist on his privilege by demurrer. *The Duke of Brunswick v. King of Hanover.* 1

**APPORTIONMENT OF COSTS.**

An information related to two objects, one failed, and the decree dismissed so much of the information as related to it, without costs, and ordered the Defendant to pay the informant his costs of the suit. Held, that the Taxing Master was wrong in apportioning the general costs of suit between the two objects. *The Attorney-General v. Lord Carington.* 454

**AUTHORITY TO SUE.**

1. A petition was presented in the names of *A.* and *B.*, but without the authority of *A.* Held, that having regard to the rights of the respondents, the petition could not be ordered to be taken off the file on the application of *A.* *Tar-buck v. Tarbuck.* 134

2. A bill being filed without the written authority of one of several co-plaintiffs, and the evidence

*S. 3* being

being unsatisfactory as to the retainer, his name was struck out as co-plaintiff with costs to be paid by the solicitor. *Pinner v. Knights.* Page 174

3. Where a solicitor files a bill without a written authority, the *onus of proof* is cast on him. If there be any doubt on the matter, the Court will hold him liable. *Ibid.*

4. A bill filed without the authority of the Plaintiff, was dismissed with costs, and the Plaintiff was taken under an attachment for non-payment of costs. The Court, on motion, ordered the solicitor to indemnify *A.*, but refused to release *A.* as against the claim of the Defendants. Held also, that *A.* was not, on such an application, to be deprived of his right against the solicitor to damages for his imprisonment. *Hood v. Phillips.* 176

5. The name of a person who had been made the next friend of an infant Plaintiff without his authority, ordered to be struck out, but liberty was given to the co-Plaintiffs to amend by naming a new next friend. *Ward v. Ward.* 251

6. As to the liability of the next friend in such a case as regards the Defendant. *Ibid.*

7. A suit was prosecuted through a solicitor, and, as the Plaintiffs alleged, without their authority. The Defendant gave notice of motion to dismiss the bill for want of prosecution, which, being served on the solicitor, he requested the Plaintiffs to name a new solicitor, which they refused to do. The solicitor then moved that he might be dismissed as solicitor. Held, that no such order could be made, but personal service on the Plaintiffs of the notice of motion to dismiss was ordered. The Plaintiffs took no step to relieve themselves from their liability. Held, that the Defendant was entitled to have the bill dismissed, with costs to be paid by the Plaintiffs, leaving them to obtain, as against the solicitor, any remedy they might have. *Terbuck v. Woodcock.* Page 581

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BEQUEST.

1. A testator gave a fund, subject to the life interest of his wife, to *A.*, *B.*, and *C.*, equally to be divided between them, but in case of the decease of *C.* without leaving lawful issue, he gave her one-third between *A.* and *B.* Held, that upon the decease of the wife, *C.* who was then living, became absolutely entitled to one-third of the fund. *Barker v. Cocks.* 82

2. Bequest of residue, in trust, after payment of an annuity of 50*l.* to *A.* for life, to apply the residue of the interest towards the maintenance of the children of *B.* until twenty-one, and in case of the death of *A.* during their minority, to apply the whole or so much as was necessary in the same way, and

and after the death of *A.*, when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of *B.* living at the death of *A.* The fund was more than sufficient to provide for the annuity. Held, that the gift to the children was not confined to those living at the death of the testatrix. *Gardner v. James.*

Page 170

3. Bequest of residue to *A.* for life, "and whatever she can transfer to go to her daughters," *B.* and *C.* Held, that the gift to *B.* and *C.* was void for uncertainty. *Flint v Hughes.* 342

*See ABSOLUTE INTEREST.*

*BREACH OF TRUST,* 11.

*CONVERSION.*

*HEIRS.*

*MORTMAIN,* 1, 2, 3.

*SUBSTITUTED GIFT.*

*SURVIVORSHIP,* 1.

**BILL.**

*See TAKING BILL OFF FILE.*

**BILL FOR ACCOUNT.**

*See PLEADING,* 4, 5.

**BILL OF REVIEW.**

1. Bill ordered, upon motion, to be taken off the file, on the ground that it was a supplemental bill in the nature of a bill of review, which ought not to have been filed without the leave of the Court. *Davis v. Bluck.* 393
2. A contract was entered into for

the sale of the vendor's interest in a lease and premises at *Doncaster*, known as the betting rooms, for the remainder of the lease granted by *A.* A bill for specific performance was filed by the purchaser, in which and in the decree the agreement was treated as comprising the premises held of *A.*, and an account of the rents was directed. It turned out that the rooms and premises were partly under *A.* and partly under *B.*, whereupon the vendor filed a second bill, praying a declaration that the whole was comprised in the agreement. Held, however, that the Plaintiff could not, upon a rehearing, obtain the relief asked by the second bill, nor could he, by such second bill, obtain the relief thereby prayed, whilst the decree stood in its present form; that to obtain the relief asked, the original cause must be reheard with the second, and, consequently, that the second bill was a supplemental bill in the nature of a bill of review, which ought not to be filed without leave of the Court. *Davis v. Bluck.* Page 393

**BILLS OF EXCHANGE.**

1. *B.* very soon after coming of age, was induced by *C. D.*, his superior officer, to accept bills for 3000*l.* at two months, for his accommodation, which were handed by *C. D.* to *E. F.* a money lender, in payment of a debt of 2590*l.* *E. F.*, who was privy to the transaction, after wards

*S s 4*

wards

wards agreed to arrange the renewal of these and another bill for 500*l.* for twelve months, in consideration of *A. B.*'s promissory note for 2500*l.* payable in three years, which sum *E. F.* charged for his expense and trouble. *E. F.* was, under the circumstances, restrained till the hearing, from suing for the 2500*l.* *Lloyd v. Clark.* Page 309

## BOND.

*See, SECURITY FOR COSTS, 1.  
SURVIVORSHIP, 2.*

## BREACH OF TRUST.

1. If trustees are directed to invest trust money on government or real securities, and they do neither, they are answerable, at the option of the *cestuis que trust*, either for the money or the stock which might have been purchased therewith. *Watts v. Girdlestone.* 188
2. Husband and wife had a power to sell real estates, with the consent of the trustees; the monies were, with all convenient speed, to be laid out in the purchase of other lands; and until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money in government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security. Held, that the trustees were liable for the stock which the money

would have produced in 1816. Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase money. *Watts v. Girdlestone.* Page 188

3. A trustee cannot, by contract, waive his right to resort to the life interest of a tenant for life, for the purpose of replacing a trust fund, which, in breach of trust, he has lent to the tenant for life. *Fuller v. Knight.* 205
4. A trustee, in breach of trust, lent the trust fund to *A. B.*, the tenant for life. The trustee afterwards concurred in a creditors' deed, by which *A. B.*'s life interest was to be applied in payment of his debts, and the trustee received thereunder a debt due to him from *A. B.* Before the other creditors had been paid, the trustee retained the income to make good the breach of trust. Held, upon a bill filed by the trustees of the creditors' deed, that this Court would not prevent such an application. *Ibid.*
5. Where a trustee has trust money in his hands which he is authorised to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing a contemplated mortgage security, in investing the money in exchequer bills. *Matthews v. Brise.* 239
6. A trustee properly invested trust money in exchequer bills, but he left them undistinguished in the hands of a broker; upon a misapplication

application of them by the broker, held, that the trustee was personally liable. *Matthews v. Brise.* Page 239

7. A trustee was empowered to invest in the public funds or on real security. He had in his hands a sum, which, in the interval between receiving and investing in a contemplated real security, he invested in exchequer bills, which he left in the hands of a broker, who misapplied them: Held, that the trustee was liable for the value of the exchequer bills at the time of the loss, and not for the stock which the money would have purchased. *Ibid.*

8. A testatrix gave her personal estate to *A.* and *B.*, subject to debts and legacies, upon certain trusts, and she appointed *A.* alone executor. A fund, over which the testatrix had a power of appointment, was transferred into the names of *A.* and *B.* *A.*, the executor, representing that a considerable part of the fund was wanting to pay debts and legacies, induced *B.* to join in selling out the fund, promising to give a mortgage security for what might not be wanted for debts, &c. *A.* received the whole, but applied a very inconsiderable sum in payment of debts, &c. Held, that *B.* was liable to replace so much of the stock as had not been applied in payment of debts, &c., and to account for the dividends. *Hewett v. Foster.* 259

9. *A.*, *B.*, and *C.* executed to a banking firm, consisting of *E.*, *F.*, and *G.*, a power of attorney, empowering them "jointly and severally" to receive the dividends and to sell out the stock itself. The power was sent by the bankers to their broker, who deposited it with the Bank of *England*. *F.* alone clandestinely sold out the stock, but the firm had credit for the proceeds. The sale was concealed, and the amount of dividends for some time accounted for. Held, that *E.* was liable for the sale, though it had taken place after the death of *C.* and *G.*; and that he would have been equally liable, though the proceeds had not been placed to the credit of the firm. *Sadler v. Lee.* Page 324

10. Bankers of trustees wrongfully sold out stock and applied it to their own purposes. Held, that the measure of their liability was the amount paid in replacing the stock. *Ibid.*

11. Bequest of chattels real to trustees to erect such monument as they should think fit, and build an organ gallery. The first object was valid, the second invalid under the Statute of Mortmain. Held, that the trustees were wrong in applying the whole to the first object, and an inquiry was directed to apportion the gift. *Adnam v. Cole.* 353

12. A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase money, retain a private debt due

due to him from the trustee. On a bill by the trustee: Held that this Court would not decree the specific performance of such a contract. *Thompson v. Blackstone.*

Page 470

13. Part of a testator's assets consisted of a promissory note. The executor, though requested by the parties interested so to do, neglected to get it in; and about two years afterwards it was lost by the insolvency of the debtor. Held, that the executor was personally liable. *Caney v. Bond.* 486

*See* BUILDING LEASE.

CHARITY, 1, 2, 4, 5, 8.

#### BUILDING LEASE.

A building lease of charity property for more than ninety-nine years, cannot stand unless there be some special grounds on which it can be protected. *The Attorney-General v. Foord.* 288

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#### CHARGE.

*See* PRIORITY OF CHARGE.

#### CHARITY.

1. A husbandry lease of charity lands for 200 years at a fixed rent, cannot, unless there be some special reason, be supported in equity.

Such a lease of charity lands cannot be supported upon any

custom of the country in which the lands are situate. *The Attorney-General v. Pargeter.*

Page 150

2. The purchaser of a charity lease takes with notice of the facts appearing thereon shewing its equitable invalidity. *Ibid.*

3. The Crown, in consideration of the past services of the town, the situation and importance of the place, the injury and damage to be expected from the King's enemies, from the current of water, and from the traffic on the bridges, and the ruin likely to take place, if the means of repairing were not provided, granted certain tolls to the corporation of *Shrewsbury*, to be applied in reparation of the bridges and walls, without yielding any account or reckoning thereof. Held, that the grant was not made to the corporation for its own benefit only as a reward for prior services: that it was the duty of the corporation to apply so much of the receipts as might be required for the purposes stated:—that this was a gift for a public and general purpose for the benefit of the town, in aid of a general charge or burden to which the burgesses and inhabitants of the town were liable, and that it was a gift to charitable uses under the statute of *Elizabeth*, and was therefore subject to the jurisdiction of this Court. *The Attorney-General v. The Corporation of Shrewsbury.* 220

4. Lease of charity property for ninety-

ninety-nine years at a fixed rent, containing no contract to repair or lay out any money thereon, set aside. *The Attorney-General v. Foord.* Page 288

5. A building lease of charity property for more than ninety-nine years, cannot stand, unless there be some special grounds on which it can be protected. *Ibid.*

6. A bequest was made to a corporation, in terms which devoted the whole improved income to a charity. In 1559, the corporation by their answer in a suit, offered to apply the whole income to the charity. The decree directed the distribution of the whole existing income, and provided that in case of an increase, the objects should receive an increase limited to 16*l.*, but it made no disposition of any surplus. Held, that under this decree the corporation was not, by implication, entitled to such surplus. *The Attorney-General v. The Drapers' Company.* 382

7. Generally, a charitable gift must be accepted according to the declared intention of the giver; but a corporation not being bound to accept an accession to its foundation, may consent to receive it with qualifications, which may be collected either from documents, or constant usage adopted at the time and persevered in downwards. *Ibid.*

8. In charity informations, the account is sometimes carried back to the date of the report of the charity commissioners, sometimes it is directed from the filing the information, and sometimes from the decree, according to the circumstances of each case. *The Attorney-General v. The Drapers' Company.* Page 382

9. A simple declaration that charity legacies are to be paid out of pure personality, will not give to such legacies a priority upon the pure personality over other legacies and charges; nor exempt any part of the estate from the ordinary rules of applying and distributing the assets. *Sturge v. Dimsdale.* 462

10. A testatrix created a mixed fund of realty and personality for payment of her debts and legacies, but she directed the charity legacies to be paid out of pure personality. She afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. *Semble*, that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty, in the proportion of the realty to the personality, but held, that the second part created a demonstrative fund of pure personality, out of which the charity legacies were to be paid. *Ibid.*

11. A testator by his will founded a charity, towards which he directed certain and definite sums to be applied, and he devised estates to a company for that purpose. The will

will contained no express beneficial gift to the company. Held, however, under the circumstances, that the company was entitled to the increased rents of the property after making the fixed payments.

*The Attorney-General v. The Grocers' Company.* Page 526

#### CLASS.

Bequest of residue, in trust, after payment of an annuity of 50*l.* to *A.* for life, to apply the residue of the interest towards the maintenance of the children of *B.*, until twenty-one, and in case of the death of *A.* during their minority, to apply the whole or so much as was necessary in the same way, and after the death of *A.*, when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of *B.* living at the death of *A.* The fund was more than sufficient to provide for the annuity. Held, that the gift to the children was not confined to those living at the death of the testatrix. *Gardner v. James.*

170

#### COMMISSION.

Depositions under a commission having been suppressed with costs, the payment of those costs was made a condition for granting a new commission. *Chameau v. Riley.*

419

#### COMMISSIONER.

*See EVIDENCE, 1, 2.*

#### COMPROMISE.

1. A compromise under the Court, held not to exclude a point of construction not then under consideration. *Bennett v. Merriman.*

Page 360

2. A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item in which he was interested, having, by mistake, been omitted in the account. Held, that he was entitled to relief, but that to obtain it, the release must be wholly set aside. *Pritt v. Clay.* 503

3. *A. B.*, the representative of a deceased partner, having filed his bill against *C. D.*, the surviving partner, for an account, *A. B.* in consideration of 500*l.*, released *C. D.* from all claims, and the bill was dismissed. By mutual error a debt of 2000*l.* owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties; *C. D.* afterwards received it. Held, that *A. B.*, notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be reopened. *Ibid.*

#### CONDITIONS OF SALE.

1. By the conditions of sale, no further evidence of identity was to be required

required than what was afforded by the abstract and the documents therein abstracted. The descriptions in the documents differed amongst themselves, and from the description in the particulars of sale. Held, that the purchaser was entitled to have further proof of the identity. *Flower v. Hartopp.* Page 476  
 2. Observations on special conditions of sale. *Paterson v. Long.* 590

#### CONFIDENTIAL COMMUNICATIONS.

*See PRODUCTION OF DOCUMENTS, 5.*

#### CONSTRUCTION.

*See ABSOLUTE INTEREST, 1.*  
*BEQUEST, 2.*  
*BREACH OF TRUST, 11.*  
*CONVERSION.*  
*DEED, 2, 3, 4, 5.*  
*DEVISE.*  
*ESTATE FOR LIFE.*  
*ESTATE TAIL.*  
*HEIRS.*  
*LEASEHOLDS.*  
*NEXT OF KIN.*  
*PARTNERSHIP, 1, 2, 3. 6.*  
*SUBSTITUTED GIFT,*  
*UNCERTAINTY.*

#### CONTEMPT.

1. The 11th Order of *August 1841*, as amended by the 6th Order of *April 1842*, does not apply to a case of default by a party in producing deeds in the Master's office

pursuant to the decree, in which case the Serjeant-at-Arms goes upon a disobedience of the four-day order. *Hobson v. Sherwood.* Page 63

2. The Lord Chancellor on the 8th of *November* ordered the Defendant to pay costs to the Plaintiff, but the order was not completed till the 23d of *December*. The Master of the Rolls on the 15th of *December* ordered the Plaintiff to pay costs to the Defendant, and on the 19th the Plaintiff offered to set off the costs. The Defendant in *January* following issued an attachment for the costs: Held, that the Plaintiff, notwithstanding he was in contempt, might, under these circumstances, move to set off the costs. *Cattell v. Simons.* 304  
 3. Costs of process of contempt for not answering, not allowed in the taxation of costs of suit as between party and party. *The Attorney-General v. Lord Carrington.* 454

#### CONTRACT.

Contract for the purchase of tithes not signed by the party chargeable, held, under the circumstances, to have been taken out of the Statute of Frauds. *Blachford v. Kirkpatrick.* 232

*See PRINCIPAL AND SURETY, 1.*

#### CONVERSION.

A testator gave his daughter a sum of money, and directed his executors,

ecutors, "as soon as convenient after his decease, to purchase an estate," and when she attained twenty-one, she was to receive the money if the land was not bought. There was a gift over. The estate was not purchased, and she invested the money in the funds. Held, on the daughter's death, that the money was impressed with the character of realty, and passed as such. *Simpson v. Ashworth.*

Page 412

the ancestor; and, secondly, that the conveyance to *D.* was void as against *B. Tyles v. Webb.*

Page 552

4. In 1829 *A.* was admitted to a copyhold, and in 1832 he deposited the copy of his admission with *B.* as a security. In 1837 *A.*'s heir, after admission, attempted to sell the property without effect. *C.* acted therein as his attorney, and *D.* as the clerk of *C.* On the 20th of *July* 1837, *A.*'s heir mortgaged the property to *C.*, by deposit of his own admission. In this transaction *D.* acted as the agent and clerk of *C.*, and as the agent of the heir. It appeared that in *November* 1835 *D.* had notice of *B.*'s incumbrance, and that on the 19th of *July* 1837 *D.* knew that the produce of the sale was to be applied in discharge of *B.*'s demand. Held, that the knowledge which *D.* possessed in *November* 1835 could not be imputed to *C.* in 1837. Secondly, that *D.*'s knowledge in *July* 1837, that the proceeds of the sale were to be applied in discharge of *B.*'s demand, did not clearly shew, that even he, at that time, recollects or knew that which he had known in *November* 1835; and, thirdly, *semble*, that *C.*, who knew that the party from whom he took had been admitted only as heir, and that the ancestor had been admitted under copy of Court Roll, dated in 1829, must be deemed that the ancestor, having the copy of Court Roll, might have created

an

## COPYHOLDS.

1. Independently of the 4 & 5 *Vict. c. 35. s. 85.* this Court has no jurisdiction to direct the partition of copyholds, nor of customary freeholds. *Jope v. Morshead.* 213
2. On a suit previous to the 4 & 5 *Vict. c. 35. s. 85.* for a partition of freeholds and copyholds, the Court directed the copyholds to be allotted in entirety to one of the parties. *Dillon v. Coppin.* 217. n.
3. *A.* mortgaged copyholds to *B.* by a deposit of a copy of his admission. *A.* died, and his heir mortgaged them to *C.* by deposit of a copy of his own admission. *C.* afterwards sold and conveyed the estate to *D.* *D.* had notice of *B.*'s security. Held, that it was unnecessary to determine whether *C.* took with notice of *B.*'s incumbrance, as by the deposit he could take only such interest as the heir could give, namely, his interest subject to the equitable charge of

an equitable mortgage by deposit, and consequently ought to have required its production before he advanced his money. *Tylee v. Webb.* Page 552

4. Trustees neglecting their trust not entitled to their costs. *England v. Downs.* Page 279

## CORPORATION.

Generally, a charitable gift must be accepted according to the declared intention of the giver; but a corporation not being bound to accept an accession to its foundation, may consent to receive it with qualifications, which may be collected either from documents, or constant usage adopted at the time and persevered in downwards. *The Attorney-General v. The Drapers' Company.* 382

See CHARITY 3. 6. 11.

## COSTS.

1. A purchaser under a decree, to whom a good title could not be made, discharged from his purchase, with his costs, charges, and expences, including the costs of his petition to be discharged. *Calvert v. Godfrey.* 97

2. A demurrer for want of equity and want of parties, succeeded only on the latter ground. No costs were given. *Allan v. Houlden.* 148

3. Parties in the same interest with the Plaintiff, not joining as Co-plaintiffs, are not entitled to the costs of a suit, which as to their interests is successful. *England v. Downs.* 279

5. Costs receivable and payable by two parties, ordered to be mutually set off, without regard to the lien of the solicitors. *Cattell v. Simons.* 304

6. Where taxation is directed after action brought, this Court does not give the client the costs of taxation, though more than one-sixth be taxed off. *Toghill v. Grant.* 348

7. A bill for the delivery up of securities on which the Defendant had commenced proceedings at law, was taken *pro confesso*. Held, that the Plaintiff was entitled to the costs at law, though the bill did not specifically pray for them. *Stanley v. Bond.* 423

## See GENERAL ORDERS, 6.

NEXT FRIEND, 1.

SECURITY FOR COSTS.

SET-OFF.

SOLICITOR AND CLIENT, 2. 4. 10.

TAXATION.

## COVENANT.

See VOLUNTARY COVENANT.

## CREDITOR'S SUIT.

A creditor's bill was filed, which also prayed other relief. Soon after a purely creditor's suit was instituted by another party, and a decree obtained therein within seven days. The Court stayed the first suit so far only as it prayed an admi-

administration of the assets. *Dryden v. Foster.* Page 146

*See VOLUNTARY COVENANT.*

### CROSS BILL.

An estate was conveyed by *A.* to *B.*, upon trust, for ten years, to apply the rents in payment to *B.* of the interest and capital of 1000*l.* lent by *B.* to *A.*, and then to sell, pay off the residue of the 1000*l.*, and hold the remainder in trust for the wife and children of *A.* The rents exceeded the interest. *B.* permitted *A.* to retain possession, and the interest was not applied as directed. Upon a bill by *B.* against *A.* and his wife and children for a sale:— Held, that *B.* could not, until he took possession, be made liable for what, without his wilful default, he might have received, except upon a cross bill raising that question. *Beare v. Prior.* 183

### CUSTOMARY FREEHOLDS.

*See PARTITION, 1.*

### CUSTOM OF COUNTRY.

*See CHARITY, 1.*

### DEBTOR AND CREDITOR.

1. A creditor against two estates for the same debt, is entitled to receive dividends on the full amount from both estates, until he has

been satisfied his debt. *Bonser v. Cox.* Page 84

2. A suit was instituted by a son against his mother. A compromise was effected, whereby the mother agreed to settle a sum on the son and his family, and pay 170*l.* amongst such of the son's creditors "as should be willing to accept the same in full discharge of their respective debts, and should express their consent" before a given day. None of the creditors assented, and no payment was made to them. The son became insolvent. Held, that the mother was not liable to pay the 170*l.* to the assignees. *Sherwood v. Walker.* 401

*See SURVIVORSHIP, 2.*

### DECREE.

1. A bequest was made to a corporation, in terms which devoted the whole improved income to a charity. In 1559, the corporation by their answer in a suit, offered to apply the whole income to the charity. The decree directed the distribution of the whole existing income, and provided that in case of an increase, the objects should receive an increase limited to 16*l.*, but it made no disposition of any surplus. Held, that under this decree the corporation was not, by implication, entitled to such surplus. *The Attorney-General v. The Drapers' Company.* 382

2. Where a bill is taken *pro confesso*, under the 11th Order of April

*April* 1842, the Plaintiff is not entitled to such decree as he can abide by, but to such decree only as he is entitled to on the record. *Stanley v. Bond.* Page 421

3. A bill for the delivery up of securities on which the Defendant had commenced proceedings at law, was taken *pro confesso*. Held, that the Plaintiff was entitled to the costs at law, though the bill did not specifically pray for them.

*Ibid.*

4. Under a decree in a legatee's suit to take the usual accounts, *A. B.* went in and claimed the residue, which the Master found him entitled to; but the residue was not then ascertained, and no order was made in respect of it. Held, that *A. B.* was not precluded from afterwards asking relief against the executor, in respect of an alleged breach of trust, in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the executor, or to claim the relief which he asked in the second. *Guidici v. Kinton.* 517

*See ACCOUNT, 4.*

**SALE UNDER COURT.**

**DECREE BY DEFAULT.**

The Plaintiff filed a traversing order. The Defendant afterwards made default in appearing at the hearing. Held, first, that the Plaintiff was not entitled to take as of course, such decree as he could abide by, but must go through his

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case and take such decree as to the Court might appear just; and, secondly, that service of the traversing order must be proved by affidavit. *Evans v. Williams.*

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*See DECREE, 2, 3.*

**DEED.**

1. At the instance of the mortgagee of the reversion, the Court declined making a stop order on deeds brought into the Master's office under a decree. *Cotton v Cotton.* 96

2. A mortgage was made, "subject to prior incumbrances." Held, under the circumstances, that a prior equitable charge was not included, it being unknown to the mortgagee, and it not appearing to have been the intention of the mortgagors to include it. *Greenwood v. Churchill.* 314

3. A suit was instituted by a son against his mother. A compromise was effected, whereby the mother agreed to settle a sum on the son and his family, and pay 170*l.* amongst such of the son's creditors "as should be willing to accept the same in full discharge of their respective debts, and should express their consent" before a given day. None of the creditors assented, and no payment was made to them. The son became insolvent. Held, that the mother was not liable to pay the 170*l.* to the assignees. *Sherwood v. Walker.* 401

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**4. A.**

4. *A.* being entitled to three debts, covenanted with *B.*, that in case he received them in full, he would pay him 1000*l.*, but in case he should receive part only, he would pay one third of the sum recovered. *A.* received one of the debts, which he wholly retained. Afterwards, and within three months before *A.*'s imprisonment and taking the benefit of the Insolvent Act, he (without pressure) assigned one of the debts to *B.*, to secure one third of the debt recovered and those still unpaid. It was set aside as fraudulent under the act. Held, also, that *B.* had not, as against the insolvent's assignees, any lien on the remaining debts, for the one third of the first debt improperly retained by *A.* *Harries v. Lloyd.*

Page 426

5. Partnership stipulation, that a son of one partner, or in case of his minority, the executor should, on the death of such partner, succeed to his share. The Court, on the terms of the partnership deed, considered it an option, and not an obligation. *Madgwick v. Wimble.*

495

*See GOODWILL.**NEXT OF KIN*, 2.*PRIORITY OF CHARGE.***DELAY.***See ENTERING APPEARANCE*, 1.*SPECIFIC PERFORMANCE*, 1.**DEMONSTRATIVE LEGACY.***See MORTMAIN*, 3.**DEMURRER.**

1. Where a Plaintiff neglects to set down a demurrer within the twelve days, the Defendant is entitled to his costs of suit and demurrer, and an order for them will be made *ex parte*. *Mackenzie v. Claridge.*

Page 123

2. A demurrer for want of equity and want of parties, succeeded only on the latter ground. No costs were given. *Allan v. Hold- den.*

148

3. Practice as to filing, entering, setting down, and submitting to a demurrer. *Hearn v. Way.* 968

*See IRREGULARITY*, 1, 2.**PRACTICE.****DEPOSITIONS.**

1. In a civil proceeding at law, the office copies of the depositions in Chancery being good evidence, the originals will not be ordered to be produced. *The Attorney-General v. Ray.*

335

2. Depositions under a commission having been suppressed with costs, the payment of those costs was made a condition for granting a new commission. *Chameau v. Riley.*

419

**DEVISE.**

1. Devise of leaseholds on trust for *A.* for life, and afterwards to his issue

issue male severally and respectively, according to their seniorities, and in default to his heirs, according to their seniorities, and in default over. Held, that *A.* took an absolute interest. *Jordan v. Lowe.* Page 350

2. Devise to *A.* for his life, and from and after his decease, "unto all and every the issue of the body of the said *A.*, share and share alike, as tenants in common, and the heirs of such issue." Held, that *A.* took an estate for life only. *Greenwood v. Rothwell.* 492

*See* BREACH OF TRUST, 11.  
CONVERSION.  
ESTATE TAIL.

## DISCHARGE.

*See* PRINCIPAL AND SURETY, 1.

## DISCOVERY.

Where a Plaintiff, by his bill, seeks a discovery of matters which might subject the Defendant to a criminal prosecution, and also seeks other legitimate discovery, it is his duty to separate the two; for if they be so mixed up or connected, that either by inference or exclusion they may lead to a disclosure which might subject the Defendant to prosecution, he is not bound to answer any portion of it. *The Earl of Lichfield v. Bond.* 88

## DISSOLUTION.

Confirmed and incurable insanity is a ground for dissolving a partnership, but a mere diminution of capacity in attending to it is insufficient for that purpose. *Sadler v. Lee.* Page 924

## DIVIDENDS.

*See* DEBTOR and CREDITOR, 1.

## DOUBLE AGENCY.

Grantor of an annuity entrusted *Y.* with a sum of money for the purpose of redeeming it. *Y.* without paying the money obtained from the grantee a deed of release of the annuity. *Y.* who acted in some respects as agent of both parties, afterwards died insolvent. Held, under the particular circumstances, that the loss must be borne by the grantor. *Vandalleur v. Blagrave.* 565

*See* FRAUD, 2.

## DOWER.

*See* EJECTMENT BILL, 1.

## DYING WITHOUT LEAVING ISSUE.

*See* ABSOLUTE INTEREST, 1.

## EJECTMENT BILL.

1. In cases where there are outstanding terms, which may be set up in defence to the action, and prevent *T & 2* a trial

a trial of the real merits of the case, or where the facts are such, and of a nature so complicated, that complete and effectual relief can only be given in equity, this Court will afford its assistance, and will, if the circumstances require it, first see that the legal requisites to the Plaintiff's title are established, and then give the necessary relief; but this must be upon a bill framed for the purpose, stating the difficulties, and praying the assistance of the Court to remove them. The cases of dower and partition are, however, exceptions to the rule. *Strickland v. Strickland.* Page 77

2. Where a party sought in this Court to recover a real estate on the ground of his interest being equitable, but did not ask relief against any impediment to a trial at law, and it turned out at the hearing that his title was a legal title, the Court refused to retain the suit to enable the Plaintiff to establish his right at law by an action or issue, and dismissed the bill. *Ibid.*

#### ENTERING APPEARANCE.

1. Liberty for the Plaintiff to enter an appearance for the Defendant will not, after a delay of two months, be granted *ex parte*. *Edmonds v. Nicoll.* 334
2. The practice in such a case is not to make an order *nisi*, but to require notice of the application to be given, or that there should

be fresh service of the *subpoena*.  
*Edmonds v. Nicoll.* Page 334

#### EQUITABLE MORTGAGE.

1. *A.* mortgaged copyholds to *B.* by a deposit of a copy of his admission. *A.* died, and his heir mortgaged them to *C.* by deposit of a copy of his own admission. *C.* afterwards sold and conveyed the estate to *D.* *D.* had notice of *B.*'s security. Held, that it was unnecessary to determine whether *C.* took with notice of *B.*'s incumbrance, as by the deposit he could take only such interest as the heir could give, namely, his interest subject to the equitable charge of the ancestor; and, secondly, that the conveyance to *D.* was void as against *B.* *Tylee v. Webb.* 552
2. In 1829 *A.* was admitted to a copyhold, and in 1832 he deposited the copy of his admission with *B.* as a security. In 1837 *A.*'s heir, after admission, attempted to sell the property without effect. *C.* acted therein as his attorney, and *D.* as the clerk of *C.* On the 20th of July 1837, *A.*'s heir mortgaged the property to *C.* by deposit of his own admission. In this transaction, *D.* acted as the agent and clerk of *C.* and as the agent of the heir. It appeared that in November 1835 *D.* had notice of *B.*'s incumbrance, and that on the 19th of July 1837 *D.* knew that the produce of the sale was to be applied in discharge of *B.*'s demand. Held, that the knowledge

knowledge which *D.* possessed in *November* 1835 could not be imputed to *C.* in 1837. Secondly, that *D.*'s knowledge in *July* 1837 that the proceeds of the sale were to be applied in discharge of *B.*'s demand, did not clearly shew, that even he, at that time, recollect or knew that which he had known in *November* 1835; and, thirdly, *semble*, that *C.* who knew that the party from whom he took it had been admitted only as heir, and that the ancestor had been admitted under copy of Court Roll, dated in 1829, must be deemed that the ancestor, having the copy of Court Roll, might have created an equitable mortgage by deposit, and consequently that *C.* ought to have required its production before he advanced his money. *Tylee v. Webb.* Page 552

#### EQUITY TO SETTLEMENT.

The wife's equity to a settlement does not attach upon filing a bill; if, therefore, the wife dies without making any claim to a settlement out of her legacy, her children, after her death, have no right to one. *De La Garde v. Lempriere.*

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#### ESTATE FOR LIFE.

Devise to *A.* for his life, and from and after his decease, "unto all and every the issue of the body of the said *A.*, share and share alike as tenants in common, and the heirs of such issue." Held, that

*A.* took an estate for life only. *Greenwood v. Rothwell.* Page 492

#### ESTATE TAIL.

1. The words "lawful heirs," held, upon the context of a will, to mean "heirs of the body." *Simpson v. Ashworth.* 412
2. A testator, having several children, directed the purchase of an estate for one of his daughters, "for her use and her lawful heirs," to be returned "if she died without lawful heirs," to the other children that had heirs. Held, upon the context, that "lawful heirs" must be construed "heirs of the body;" that the daughter took an estate tail, and that the gift over was also an estate tail. *Ibid.*

#### ESTOPPEL.

See BREACH OF TRUST, 3, 4.

#### EVIDENCE.

1. Depositions suppressed after publication, on the ground that one of the commissioners was the nephew and agent of the Plaintiff. *Lord Mostyn v. Spencer.* 155
2. The fact of publication having passed, or the death of the witness, will not prevent the suppression of the depositions, when the commissioner is disqualified by interest, provided the application be made within a reasonable time

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after the discovery of the objection.

*Lord Mostyn v. Spencer.* Page 135

3. A witness was examined for the Plaintiff and cross-examined by the Defendant on other matters. Held, that his further evidence on behalf of the Defendant could not be received, upon an inquiry before the Master, except by order of the Court. *England v. Downs.*

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4. Application to the Court to examine on behalf of the Plaintiff, a Defendant, to whose answer a replication had been filed, refused. *Baker v. Thurnall.* 333

5. In a civil proceeding at law, the office copies of the depositions in Chancery being good evidence, the originals will not be ordered to be produced. *The Attorney General v. Ray.* 335

*See DECREE BY DEFAULT.*

PAYMENT OF CONSIDERATION MONEY.

#### EXAMINING DEFENDANT AS WITNESS.

*See EVIDENCE, 4.*

#### EXCEPTIONS.

1. Notice of exceptions was not given until a day too late, and was intituled wrongly. The Court relieved the party from the effects of the irregularity on payment of costs. *Bradstock v. Whatley.* 61
2. One general exception was taken to the Master's report of a good title, which did not point out the objections to the title. The Court

disapproved of this inconvenient mode of proceeding. *Flower v. Hartopp.* Page 476

*See IMPERTINENCE, 1.*

#### EXCHEQUER BILLS.

1. A trustee properly invested trust money in exchequer bills, but he left them unmarked and undistinguished in the hands of a broker; upon a misapplication of them by the broker, held, that the trustee was personally liable. *Matthews v. Brise.* 239
2. A trustee was empowered to invest in the public funds or on real security. He had in his hands a sum, which, in the interval between receiving and investing in a contemplated real security, he invested in exchequer bills, which he left in the hands of a broker, who misapplied them: Held, that the trustee was liable for the value of the exchequer bills at the time of the loss, and not for the stock which the money would have purchased. *Ibid.*

#### EXECUTOR.

1. A surviving partner being the executor of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease, for the benefit of the estate; nor is an executor and legatee of such surviving partner. *Stocken v. Dawson.* 371
2. Part of a testator's assets consisted

sisted of a promissory note. The executor, though requested by the parties interested so to do, neglected to get it in; and about two years afterwards it was lost by the insolvency of the debtor. Held, that the executor was personally liable. *Caney v. Bond.*

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3. An executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stock broker for identifying him at the bank. He was allowed the payment in passing his accounts. *Jones v. Powell.*

488

4. After an estate has been fully administered in this Court, the executor will not be permitted, without the leave of the Court, to prosecute an action to recover part of the testator's property from a party to the suit. *Oldfield v. Cobbett.*

515

*See DECREE, 4.*

TRUSTEE AND CESTUI QUE TRUST, 8.

#### EXONERATION.

1. A simple declaration that charity legacies are to be paid out of pure personality, will not give to such legacies a priority upon the pure personality over other legacies and charges; nor exempt any part of the estate from the ordinary rules of applying and distributing the assets. *Sturge v. Dimsdale.* 462
2. A testatrix created a mixed fund of realty and personality for payment of her debts and lega-

cies, but she directed the charity legacies to be paid out of pure personality. She afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. *Semble,* that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty, in the proportion of the realty to the personality, but held, that the second part created a demonstrative fund of pure personality, out of which the charity legacies were to be paid. *Sturge v. Dimsdale.*

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#### EXTENDING INJUNCTION.

1. The common injunction to stay trial will not be extended, if it appears from the pleadings, contrary to the usual affidavit, that the discovery will not assist the Defendant at law in his defence to the action. *Ashby v. Jackson.*
2. The Plaintiff having obtained the common injunction upon the allowance of exceptions for insufficiency, procured an order to amend without prejudice to the injunction, undertaking to amend within a week, and that the Defendant might answer the exceptions and amendments together. The amendments having been made accordingly, the Court ex-

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tended the common injunction to stay trial. *Archer v. Hudson.*  
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## FACTOR.

*A.* consigned goods of the value of 1800*l.* to *B.*, who transferred the bill of lading to *C.* to secure 1000*l.* *B.* having become bankrupt, *C.*, as *B.*'s factor, claimed, as against *A.*'s title to stop *in transitu*, a right to retain the whole in satisfaction of a general balance due to him from *B.* Held, first, that he was not entitled beyond the 1000*l.*; and, secondly, that *A.*'s remedy against *C.* for the surplus was in equity. *Spalding v. Ruding.* 376

## FAMILY ARRANGEMENT.

*See DEED*, 3.

## FOREIGN LAW.

1. A bill, filed by *Charles*, ex-Duke of *Brunswick*, against the King of *Hanover* (a subject of this realm), stated that by a decree of the *Germanic Diet*, followed by a declaration of his *Agnati*, he had been deposed, and his brother appointed successor, and that by an instrument signed by the reigning Duke and by *William* the Fourth, and his brothers, the Duke of *Cambridge* had been appointed guardian of the Plaintiff's fortune,

and the guardianship "was to be legally established in *Brunswick*, where it was to have its locality." That on the death of *William* the Fourth, the King of *Hanover* was appointed guardian, and possessed himself of the private property of the Plaintiff. The bill alleged that the instrument was void, and prayed a declaration to that effect, and for an account. Held, that the alleged acts under the instrument, were not such as rendered the Defendant liable to be sued or subject to the jurisdiction of this Court. *The Duke of Brunswick v. The King of Hanover.*

Page 1

2. *Sembler*, also, that the instrument complained of was, under the circumstances stated in the bill, connected with political and state transactions, and was a state document. *The Duke of Brunswick v. The King of Hanover.* 2
3. In a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew a case rendering the sovereign prince liable to be sued as a subject. *Ibid.*
4. A simple allegation that a foreign instrument depending on foreign law is null and void, is too vague. *Ibid.*

*See INTERNATIONAL LAW.*

## FOREIGN PRINCE.

*See FOREIGN LAW*, 3.

## INTERNATIONAL LAW.

## FOREIGN

## FOREIGN SOVEREIGN.

*See FOREIGN LAW.**INTERNATIONAL LAW.*

## FORMA PAUPERIS.

1. A Plaintiff claiming partly under the heirs of a *French* subject, and through an instrument of doubtful construction, obtained an order of course at the Rolls to sue in *formā pauperis*, upon the simple allegation of his poverty. Held, that the order was irregular, on the ground of the suppression of the facts, which ought to have been presented for the consideration of the Court upon the application. *St. Victor v. Devereux.*

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2. An administrator having been admitted at the Rolls to sue in *formā pauperis*, the order was discharged by Lord *Hardwicke*. *Paradice v. Sheppard.* 586. n.

*See ORDER OF COURSE, 3.*

## FOUR DAY ORDER.

The four day order to enforce the production of documents in the Master's office by a party to the cause, does not require personal service. *Hobson v. Sherwood.*

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## FRAUD.

1. *A. B.*, very soon after coming of age, was induced by *C. D.*, his superior officer, to accept bills for 3000*l.* at two months, for his accommodation, which were handed

by *C. D.* to *E. F.*, a money lender, in payment of a debt of 2590*l.* *E. F.*, who was privy to the transaction, afterwards agreed to arrange the renewal of these and another bill for 500*l.* for twelve months in consideration of *A. B.*'s promissory note for 2500*l.* payable in three years, which sum *E. F.* charged for his expence and trouble. *E. F.* was, under the circumstances, restrained till the hearing, from suing for the 2500*l.* *Lloyd v. Clark.* Page 309

2. The Defendant, through the agency of one *Yates*, granted to the Plaintiff an annuity, redeemable on six months' notice. In *May* 1830, notice was given to repurchase in *November*, and in *August* 1830, the Defendant entrusted *Yates* with the money for the repurchase. In *October* *Yates* prevailed on the Plaintiff to execute the deed of re-assignment dated in *November*, indorsed on the annuity deed, and without receiving the repurchase money, but the Plaintiff did not sign any receipt for the money. *Yates* afterwards produced the deed to the son of the Defendant, to satisfy him of the payment, and it was handed back to *Yates* to be kept by him, with the Defendant's other documents. *Yates* acted in the transaction as agent of both parties. He retained the money, and, to deceive both, continued the payment of the annuity, but afterwards died insolvent. The Defendant subsequently obtained possession of the deed. Held,

Held, under the circumstances, that the Defendant was not discharged, but was bound to pay to the Plaintiff the repurchase money with interest from *November 1830*, the Plaintiff accounting for the subsequent receipts of the annuity. *Vandaleur v. Blagrave.* Page 565  
*See DEED, 4.*

PRODUCTION OF DOCUMENTS,  
 1, 2.

RELEASE.

SETTING ASIDE DEEDS, 3.

—  
**GAMING.**

Where a Plaintiff, by his bill, seeks a discovery of matters which might subject the Defendant to a criminal prosecution, and also seeks other legitimate discovery, it is his duty to separate the two; for if they be so mixed up or connected, that either by inference or exclusion they may lead to a disclosure which might subject the Defendant to prosecution, he is not bound to answer any portion of it. *The Earl of Lichfield v. Bond.* 88

**GENERAL ORDERS.**

(1.) 6th Order of *April 1828.*

The 6th Order of *April 1828* does not apply to a case, where a Defendant is ordered to answer amendments and exceptions together. *Lloyd v. Clark.* 467

(2.) 9th Order of *May 1837.*

In a Vice-Chancellor's cause, the

Plaintiffs described themselves as resident abroad. The Defendants obtained *ex parte* at the Rolls, an order for security for costs. An application to the Master of the Rolls to discharge it, on the ground that the Defendants had in their hands funds belonging to the Plaintiffs sufficient to indemnify them, was refused, because there was no irregularity in the order, and the cause being attached to the Vice-Chancellor's Court, the Master of the Rolls could not enter into the merits. *Hooper v. Paver.* Page 173

(3.) 8th Order of *August 1841.*

Liberty for the Plaintiff to enter an appearance for the Defendant will not, after a delay of two months, be granted *ex parte.*

The practice in such a case is not to make an order *nisi*, but to require notice of the application to be given, or that there should be fresh service of the *subpœna*. *Edmonds v. Nicoll.* 394

(4.) 11th Order of *August 1841.*

The 11th Order of *August 1841*, as amended by the 6th Order of *April 1842*, does not apply to a case of default by a party in producing deeds in the Master's office pursuant to the decree, in which case the Serjeant-at-Arms goes upon a disobedience of the four day order. *Hobson v. Sherwood.* 68

(5.) 30th Order of *August 1841.*

Certain persons were properly made parties to a suit, previous to the orders of *August 1841*, which made them

them no longer necessary parties. Held, that they might properly be dismissed at the subsequent hearing. *Tarbuck v. Greenall.* Page 358

(6.) 34th Order of *August 1841.* Where a Plaintiff neglects to set down a demurrer within the twelve days, the Defendant is entitled to his costs of suit and demurrer, and an order for them will be made *ex parte.* *Mackenzie v. Claridge.* 123

(7.) 6th Order of *April 1842.* The 11th Order of *August 1841*, as amended by the 6th Order of *April 1842*, does not apply to a case of default by a party in producing deeds in the Master's office pursuant to the decree, in which case the Serjeant-at-arms goes upon a disobedience of the four day order. *Hobson v. Sherwood.* 63

(8.) 24th Order of *October 1842.* Notice of exceptions was not given until a day too late, and was intituled wrongly. The Court relieved the party from the effects of the irregularity on payment of costs. *Bradstock v. Whatley.* 61

4th Order of *April 1828.* — See ANSWER, 3.

6th Order of *April 1828.* — See ANSWER, 3.

10th Order of *December 1833.* — See ORDER TO REVIVE.

6th Order of *May 1839.* — See GENERAL ORDERS, 2.

21st Order of *August 1841.* — See TRAVERSING ORDER, 2.

22d Order of *August 1841.* — See TRAVERSING ORDER, 2.

24th Order of *August 1841.* — See DECREE BY DEFAULT.

32d Order of *August 1841.* — See PARTIES, 1.

34th Order of *August 1841.* — See ORDER OF COURSE, 1.

39th Order of *August 1841.* — See OBJECTION FOR WANT OF PARTIES, 2.

44th Order of *August 1841.* — See DECREE BY DEFAULT.

10th Order of *December 1843.* — See REVIVOR.

## GOODWILL.

1. The goodwill of a victualler's business, held, under the circumstances, to be incident to the stock and licence, and not to the premises on which the business was carried on. *England v. Downs.* Page 269

2. A widow carried on the business of a licensed victualler on premises held by her from year to year. Prior to her second marriage, she assigned her household goods, furniture, stock in trade, brewing utensils, and all other her effects, upon trusts excluding her husband. She married. Held, that the goodwill of the trade, which was afterwards sold, passed by the deed as incident to the stock and licence, and not to the husband with the premises. *Ibid.*

## GUARDIAN.

Where a guardian *ad litem* of a person of unsound mind, though not

so found by inquisition, dies, a special application is necessary to obtain the appointment of a new guardian, and an appointment by an order of course is irregular. *Needham v. Smith.* Page 130

#### HEIRS.

Gift of personalty to *A.* for life, and afterwards to his children, and in default to the *heirs* of *B.* Held, that the next of kin were entitled under the ultimate limitation. *Evans v. Salt.* 266

#### HUSBAND AND WIFE.

The wife's equity to a settlement does not attach upon filing a bill; if, therefore, the wife dies without making any claim to a settlement out of her legacy, her children, after her death, have no right to one. *De la Garde v. Lempriere.* 344

*See NEXT OF KIN, 1, 2.*

#### HUSBANDRY LEASE.

A husbandry lease of charity lands for 200 years at a fixed rent, cannot, unless there be some special reason, be supported in equity.

Such a lease of charity lands cannot be supported upon any custom of the country in which the lands are situate. *The Attorney-General v. Pargeter.* 150

#### IDENTITY.

By the conditions of sale, no further evidence of identity was to be required than what was afforded by the abstract and the documents therein abstracted. The descriptions in the documents differed amongst themselves, and from the description in the particulars of sale. Held, that the purchaser was entitled to have further proof of the identity. *Flower v. Hartopp.* Page 476

#### IMPERTINENCE.

1. Exceptions for impertinence cannot be sustained, if the materiality of the passages is so connected with the merits of the cause as to render it proper matter for discussion and for the determination of the Court at the hearing. *The Attorney-General v. Rickards.* 444
2. An information was filed by the Attorney-General at the relation of *A. B.*, to set aside a fraudulent deed executed by an outlaw in a civil action, between the judgment and inquisition. Held, that statements shewing the interest of the relators and the motives for the execution of the deeds as against the creditors, were not impertinent. *Ibid.*
3. A Plaintiff may call for information of a very minute character, which the Defendant is bound in duty to afford, yet he may do it in such

such a way as to amount to what is called impertinence, or prolixity amounting to impertinence.

*Marshall v. Mellersh.* Page 558

4. Where a party is required to set forth information, and he refers to a book containing all that information, it will be impertinent for him afterwards to repeat the information contained in that book.

*Ibid.*

#### IMPROVEMENTS.

*See MORTGAGOR AND MORTGAGEE,* 4.

#### INCLOSURE.

The right to the tithes of an allotment generally follows the right to the old tenement, in respect of which the allotment is made.

*Blachford v. Kirkpatrick.* 232

#### INCREASED RENTS.

*See TRUST,* 2.

#### INFANT.

1. The Court has no authority to sell the real estate of an infant, or to convert it, upon the notion that it would be beneficial. *Calvert v. Godfrey.* 97

2. A trader who had freehold, copyhold, and personal estate, died in September 1832, leaving an infant heir. His estate was insufficient to pay his debts and charges. His partners, however, by deed, took upon themselves to pay all the debts, and secured the principal part of his property for his family.

A suit was instituted for carrying

the deed into execution, and the Master found that it would be for the benefit of the infant heir, that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 1 W. 4. c. 60. Held, that a sale under the decree could not be enforced; that the Court had no jurisdiction to order the sale; and that the infant was not a trustee within the act. *Calvert v. Godfrey.* Page 97

3. Two suits were instituted on behalf of infants, but it was found that it was most for their benefit to prosecute the second. The first suit was properly instituted; but there being some impropriety of conduct on the part of the solicitor, who instituted it on his own authority, and nominated his brother as next friend, the first bill was, upon an interlocutory application, dismissed without costs. *Starten v. Bartholomew.* 143

4. Special order for allowance of maintenance to an infant resident with her father out of the jurisdiction. *De Weever v. Rochport.* 991

#### INJUNCTION.

1. If a Plaintiff coming for an injunction to restrain the use of his trade marks appears to have been guilty of misrepresentations to the public, the Court will not interfere in the first instance. *Perry v. Truefit.* 66

2. Injunction to restrain a party from

from making and sending to *Turkey* watches having the Plaintiff's name or the word "warranted" engraved thereon in *Turkish* characters in imitation of the Plaintiff's watches. *Gout v. Alepoglu.*

Page 69 n.

3. The common injunction to stay trial will not be extended, if it appears from the pleadings, contrary to the usual affidavit, that the discovery will not assist the Defendant at law in his defence to the action. *Ashby v. Jackson.*

336

4. Substituted service of an injunction ordered. *Kirkman v. Honnor.* 400

5. A motion being made for an injunction, it stood over with liberty to the Plaintiff to bring an action to establish his right. The Plaintiff neglecting to proceed therein, the motion was refused with costs. *Perry v. Truefitt.* 418

6. The Plaintiff having obtained the common injunction upon the allowance of exceptions for insufficiency, procured an order to amend without prejudice to the injunction, undertaking to amend within a week, and that the Defendant might answer the exceptions and amendments together. The amendments having been made accordingly, the Court extended the common injunction to stay trial. *Archer v. Hudson.* 474

*See ADMINISTRATION SUIT, 2.*

ANSWER, 2.

FRAUD, 1.

TRADE MARKS.

### INQUIRY.

On a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court will grant an inquiry; but where there is a material omission in the proof of the Plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the Plaintiff had recovered in ejectment a portion of the estate from the Defendant, it not appearing what were the circumstances of that proceeding, or whether the Plaintiff's title, as alleged, was therein proved. *Jope v. Morshead.*

Page 213

### INSOLVENT.

*See INSOLVENT ACT.*

### INSOLVENT ACT.

A. being entitled to three debts, covenanted with B., that in case he received them in full, he would pay him 1000*l.*, but in case he should receive part only, he would pay one third of the sum recovered. A. received one of the debts, which he wholly retained. Afterwards, and within three months before A.'s imprisonment and taking the benefit of the Insolvent Act, he (without pressure) assigned one of the debts to B., to secure one third of the debt recovered and those still unpaid. It was set aside as fraudulent under the act. Held, also, that B. had

*B.* had not, as against the insolvent's assignees, any lien on the remaining debts, for the one third of the first debt improperly retained by *A.* *Harries v. Lloyd.*  
Page 426

## INTEREST.

1. A stipulation that interest should be allowed on the capital of partners presumed under the circumstances. *Millar v. Craig.* 433
2. In a partnership between *A.* and *B.* interest was allowed on the capitals. *C.*, who was a clerk and relative, was cognizant of the terms on which this partnership was carried on. *B.* retired, and *A.* and *C.* continued the business: the whole capital embarked therein belonged to *A.* There was an absence of all proof of any agreement between *A.* and *C.* in respect of interest on capital. *D.* and *E.* were afterwards admitted into the business, and an interest account of capital was then resumed. Held, under these circumstances, and from the knowledge that *C.* had of the terms on which the first partnership had been carried on, that it must be assumed that interest on capital was to be allowed in the second partnership. *Ibid.*
3. By the decree the lands of the Defendant were declared chargeable with 40*l.* a year, and the Master was directed to take an account of the arrears, and the Defendant was ordered to pay what should be found due. Held, that the Defendant was not, under

the 1 & 2 Vict. c. 110. ss. 17, 18., liable to pay interest on the amount found due, from the date of the decree to the date of the Master's report. *The Attorney-General v. Lord Carrington.*

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## INTERNATIONAL LAW.

1. Discussion of the question whether a sovereign prince is liable to the jurisdiction of the courts of a foreign country, in which he happens to be resident, and as to the liability to suit of one who unites in himself the characters both of an independent foreign sovereign and a subject. *The Duke of Brunswick v. The King of Hanover.* 1
2. A sovereign prince, resident in the dominions of another, is ordinarily exempt from the jurisdiction of the courts there. *Ibid.*
3. A foreign sovereign may sue in this country, both at law and in equity; and, if he sues in equity, he submits himself to the jurisdiction, and a cross bill may be filed against him, which he must answer on oath; but a foreign sovereign does not, by filing a bill in Chancery against *A.*, make himself liable to be sued in that court for an independent matter by *B.*  
*Ibid.*
4. The King of Hanover, after his accession, renewed his oath of allegiance to the Queen of England, and claimed the rights of an English peer. Held, that he was exempt from the jurisdiction of the English

*English* courts for acts done by him as a sovereign prince, but was liable to be sued in those courts in respect of matters done by him as a subject. Held, also, that the sovereign character prevailed where the acts were done abroad, and also where it was doubtful in which of the two characters they had been done. *The Duke of Brunswick v. The King of Hanover.* Page 1

*See FOREIGN LAW.*

#### IRREGULARITY.

1. The Plaintiff submitted to a demurrer by omitting to set it down within twelve days, and the V. C. ordered him to pay the costs of suit. The Plaintiff afterwards obtained at the Rolls an order of course to amend, suppressing in his petition the order of the Vice-Chancellor. It was discharged for irregularity on the ground of the suppression. *Cartwright v. Smith.* 121

2. The Plaintiff upon filing a demurrer wrote to say he submitted thereto, and would obtain an order to amend. More than two months afterwards, he obtained an order, as of course, to amend: it was discharged for irregularity. *Hearn v. Way.* 368

3. A Defendant obtained a reference under the Contempt Act, to inquire whether by poverty he was unable to answer. The Master reported in the negative. By an order of the Vice-Chancellor the

bill was taken *pro confesso*, without prejudice to the Defendant applying within ten days to put in his answer. The Defendant, suppressing the previous circumstances, then obtained an order of course for leave to defend in *formâ pauperis*. The order was discharged. *Nowell v. Whitaker.* Page 407

*See EXCEPTIONS.*

*ORDER OF COURSE*, 4, 5.

#### ISSUE MALE.

*See DEVISE*, 1.

#### JOINT DEBT.

*A.* and *B.* were obligors in a joint bond: *A.*, who was alleged to be the principal debtor, died. Held, that his assets were not in equity liable upon the bond, but that the liability survived to *B.* *Richardson v. Horton.* 185

#### JOINT LIABILITY.

*See SURVIVORSHIP*, 2.

#### JURISDICTION.

1. Discussion of the question whether a sovereign prince is liable to the jurisdiction of the courts of a foreign country, in which he happens to be resident, and as to the liability to suit of one who unites in

in himself the characters both of an independent foreign sovereign and a subject. *The Duke of Brunswick v. The King of Hanover.* Page 1

2. A sovereign prince, resident in the dominions of another, is ordinarily exempt from the jurisdiction of the Courts there. *Ibid.*

3. A foreign sovereign may sue in this country, both at law and in equity; and, if he sues in equity, he submits himself to the jurisdiction, and a cross bill may be filed against him, which he must answer on oath; but a foreign sovereign does not, by filing a bill in Chancery against *A.*, make himself liable to be sued in that court for an independent matter by *B.* *Ibid.*

4. The King of *Hanover*, after his accession, renewed his oath of allegiance to the Queen of *England*, and claimed the rights of an *English* peer. Held, that he was exempt from the jurisdiction of the *English* courts for acts done by him as a sovereign prince, but was liable to be sued in those Courts in respect of matters done by him as a subject. Held, also, that the sovereign character prevailed where the acts were done abroad, and also where it was doubtful in which of the two characters they had been done. *Ibid.*

5. A bill filed by *Charles*, ex-Duke of *Brunswick*, against the King of *Hanover* (a subject of this realm), stated that, by a decree of the *Germanic* Diet, followed by a declaration of his *Agnati*, he had been deposed, and his brother appointed successor, and that by an instrument signed by the reigning Duke and by *William* the Fourth and his brothers, the Duke of *Cambridge* had been appointed guardian of the Plaintiff's fortune, and the guardianship "was to be legally established in *Brunswick*, where it was to have its locality;" that on the death of *William* the Fourth, the King of *Hanover* was appointed guardian, and possessed himself of the private property of the Plaintiff. The bill alleged that the instrument was void, and prayed a declaration to that effect, and for an account. Held, that the alleged acts under the instrument were not such as rendered the Defendant liable to be sued or subject to the jurisdiction of this Court. *The Duke of Brunswick v. The King of Hanover.* Page 1

6. *Semble*, also, that the instrument complained of was, under the circumstances stated in the bill, connected with political and state transactions, and was a state document. *Ibid.*

7. The Master of the Rolls has jurisdiction to direct costs which have been ordered by the Lord Chancellor to be paid by the Defendant to the Plaintiff, to be set off against costs ordered by the Master of the Rolls, to be paid by the Plaintiff to the Defendant. The order may be obtained on motion, and the notice *Uu* of

of motion may be given before the taxation. *Cattell v. Simons.*

Page 304

*See CHARITY, 3.*

EJECTMENT BILL.

INFANT, 1, 2.

ORDER OF COURSE, 6.

PRACTICE.

SECURITY FOR COSTS, 2.

STOPPAGE IN TRANSITU, 2.

VENDOR AND PURCHASER, 3.

#### LAWFUL HEIRS.

1. The words "lawful heirs," held, upon the context of a will, to mean "heirs of the body." *Simpson v. Ashworth.* 412

2. A testator, having several children, directed the purchase of an estate for one of his daughters, "for her use and her lawful heirs," to be returned "if she died without lawful heirs," to the other children that had heirs. Held, upon the context, that "lawful heirs" must be construed "heirs of the body:" that the daughter took an estate tail, and that the gift over was also an estate tail.

*Ibid.*

#### LEASE.

Lease of charity property for ninety-nine years at a fixed rent, containing no contract to repair or lay out any money thereon, set aside. *The Attorney-General v. Foord.* 288

*See CHARITY, 1, 2, 5.*

#### LEASEHOLDS.

Two houses, held under one lease, were sold separately to *A.* and *B.* The lease was produced and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent between the two purchasers, but did not notice covenants to insure, &c., and a proviso for re-entry on non-performance, contained in the lease. Held, that though *A.* might be evicted by the default of *B.*, still he was, under the circumstances, bound to complete. *Paterson v. Long.* Page 590

#### LEGATEE'S SUIT.

Under a decree in a legatee's suit to take the usual accounts, *A. B.* went in and claimed the residue which the Master found him entitled to; but the residue was not then ascertained, and no order was made in respect of it. Held, that *A. B.* was not precluded from afterwards asking relief against the executor, in respect of an alleged breach of trust, in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the executor, or to claim the relief which he asked in the second. *Guidici v. Kinton.* 517

#### LETTER MISSIVE.

*See PRACTICE.*

LIEN

## LIEN.

*See SET OFF, 1.*

STOPPAGE IN TRANSITU, 1.

## LUNACY.

1. Where a guardian *ad litem* of a person of unsound mind, though not so found by inquisition, dies, a special application is necessary to obtain the appointment of a new guardian, and an appointment by an order of course is irregular. *Needham v. Smith.* Page 190
2. The Court under the circumstances of the case, refused to set aside deeds executed by one under restraint in a lunatic asylum, under medical certificates. *Selby v. Jackson.* 192
3. When a party, without authority, but *bonâ fide*, assumes the management of the property of one mentally incompetent, this Court will not, on his recovery, restore to him his property without making an equitable allowance for the expenses and liabilities. *Ibid.*
4. Difficulty in holding a partner who ostensibly takes an active part in the conduct of the business free from responsibility, on the ground of insanity, in respect of the acts of the firm. *Sadler v. Lee.* 324
5. Confirmed and incurable insanity is a ground for dissolving a partnership, but a mere diminution of capacity in attending to it is insufficient for that purpose. *Ibid.*

## MAINTENANCE.

Special order for allowance of maintenance to an infant resident with her father out of the jurisdiction. *De Weever v. Rockport.* Page 391

## MASTER'S OFFICE.

1. Where a party takes his state of facts into the Master's office, and obtains leave to examine witnesses and completes the examination, his opponent's state of facts may, at any time before publication, be amended by leave of the Master. *Earl Nelson v. Lord Bridport.*

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2. The Plaintiff and Defendant took their states of facts into the Master's office. The Plaintiff completed the examination of his witnesses, and was about to obtain an order to pass publication, when the Defendant, with the Master's permission, carried into the Master's office an amended state of facts. Held, not irregular, and a motion in the alternative to suppress it and the subsequent proceedings, or that the Defendant might pay the costs occasioned, was refused with costs. *Ibid.*

*See EVIDENCE, 3.*

GENERAL ORDERS, 4.

## MISDESCRIPTION.

*See VENDOR AND PURCHASER, 4.*

## MISREPRESENTATION.

*See INJUNCTION, 1.*

U u 2

MIS-

## MISTAKE.

*See RELEASE*, 3, 4.

## MONUMENT.

*See MORTMAIN*, 1.

## MORTGAGE.

*See DEED*, 2.

## EQUITABLE MORTGAGE.

MORTGAGOR AND MORTGAGEE, 1, 2, 3.

## PRIORITY OF CHARGE.

## MORTGAGEE.

*See STOP ORDER*.

## MORTGAGOR AND MORTGAGEE.

1. An estate was conveyed by *A.* to *B.*, upon trust, for ten years, to apply the rents in payment to *B.* of the interest and capital of 1000*l.* lent by *B.* to *A.*, and then to sell, pay off the residue of the 1000*l.*, and hold the remainder in trust for the wife and children of *A.* The rents exceeded the interest. *B.* permitted *A.* to retain possession, and the interest was not applied as directed. Upon a bill by *B.* against *A.* and his wife and children for a sale: Held, that *B.* could not, until he took possession, be made liable for what, without his wilful default, he might have received, except upon a cross bill raising that question. *Beare v. Prior.*

Page 183

2. A mortgagee in possession held liable for a damage occasioned by his pulling down two cottages on the property. *Sandon v. Hooper.*

Page 246

3. A mortgagee in possession will be allowed for repairs necessary for the support of the property, and for doing that which is essential for the protection of the title of the mortgagor. If he has got the consent of the mortgagor or has given him notice in which he acquiesces, he may be allowed for money laid out in increasing the value of the property, but he is not justified in increasing the value of the estate by improvements so as to cripple the mortgagor's power of redemption. *Ibid.*

4. Mortgagee in possession, claiming upon a bill for redemption, to be allowed for substantial repairs and lasting improvement, but adducing no proof of any such expenditure, held not entitled to any inquiry on the subject. *Ibid.*

## MORTMAIN.

1. Bequest of chattels real to trustees to erect such monument as they should think fit, and build an organ gallery. The first object was valid, the second invalid under the Statute of Mortmain. Held, that the trustees were wrong in applying the whole to the first object, and an inquiry was directed to apportion the gift. *Adnam v. Cole.* 353
2. A simple declaration that charity legacies

legacies are to be paid out of pure personality will not give to such legacies a priority upon the pure personality over other legacies and charges; nor exempt any part of the estate, from the ordinary rules of applying and distributing the assets. *Sturge v. Dimsdale.* Page 462

3. A testatrix created a mixed fund of realty and personality for payment of her debts and legacies, but she directed the charity legacies to be paid out of pure personality. She afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. *Semble*, that the direction alone was not of itself sufficient to exempt the charity legacies from being payable out of the realty, in the proportion of the realty to the personality, but held that the second part created a demonstrative fund of pure personality, out of which the charity legacies were to be paid.

*Ibid.*

#### MOTION.

A motion being made for an injunction, it stood over with liberty to the Plaintiff to bring an action to establish his right. The Plaintiff neglecting to proceed therein, the motion was refused with costs. *Perry v. Truefitt.* 418

*See ANSWER, 2.*

*See NOTICE OF MOTION.*

*PAYMENT INTO COURT.*  
*SET-OFF, 2.*

#### NEXT FRIEND.

1. Two suits were instituted on behalf of infants, but it was found that it was most for their benefit to prosecute the second. The first suit was properly instituted; but there being some impropriety of conduct on the part of the solicitor, who instituted it on his own authority, and nominated his brother as next friend, the first bill was, upon an interlocutory application, dismissed without costs. *Starten v. Bartholomew.* Page 143
2. The name of a person who had been made the next friend of an infant Plaintiff without his authority, ordered to be struck out, but liberty was given to the co-Plaintiffs to amend by naming a new next friend. *Ward v. Ward.* 251
3. As to the liability of the next friend in such a case as regards the Defendant. *Ibid.*

#### NEXT OF KIN.

1. A widow, as such, cannot take under a limitation to the next of kin of her husband according to the statute of distributions. *Cholmondeley v. Lord Ashburton.* 86
2. In a marriage settlement, the ultimate limitation of a fund was *U u 3* to

wife died, and the husband married again and died: Held, that his widow took nothing under this limitation. *Cholmondeley v. Lord Ashburton.* Page 86

3. Gift of personalty to *A.* for life, and afterwards to his children, and in default to the *heirs* of *B.* Held, that the next of kin were entitled under the ultimate limitation. *Evans v. Salt.* 266

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#### NOTICE.

1. The purchaser of a charity lease takes with notice of the facts appearing thereon, shewing its equitable invalidity. *The Attorney-General v. Pargeter.* 150

2. Upon a question whether one partner had notice of the irregular course of dealing of his co-partner, to the prejudice of their customer, the Court was of opinion, that he ought to be deemed to have known the facts, it appearing from the evidence, that if he

In this transaction, *D.* acted as the agent and clerk of *C.*, and as the agent of the heir. It appeared that in *November* 1835, *D.* had notice of *B.*'s incumbrance, and that on the 19th of *July* 1837 *D.* knew that the produce of the sale was to be applied in discharge of *B.*'s demand. Held, that the knowledge which *D.* possessed in *November* 1835 could not be imputed to *C.* in 1837. Secondly, that *D.*'s knowledge in *July* 1837, that the proceeds of the sale were to be applied in discharge of *B.*'s demand, did not clearly shew that even he, at that time, recollects or knew that which he had known in *November* 1835; and, thirdly, *semble*, that *C.* who knew that the party from whom he took it had been admitted only as heir, and that the ancestor had been admitted under copy of Court Roll, dated in 1829, must be deemed that the ancestor, having the copy of Court Roll, might have created an equitable mortgage by deposit, and consequently that *C.* ought to have required its production before he advanced his money.

*Tylee v. Webb.* Page 552

*See EXCEPTIONS, 1.*

#### NOTICE OF MOTION.

A Plaintiff cannot before appearance serve a notice of motion on the Defendant, without first obtaining the special leave of the Court, and the notice of motion should state

that such leave has been given.  
*Jacklin v. Wilkins.* Page 607

#### OBJECTION FOR WANT OF PARTIES.

1. Where a cause is set down upon an objection for want of parties, the Plaintiff begins. *Bradstock v. Whatley.* 451
2. Where a cause is set down upon an objection for want of parties under the 99th General Order of *August* 1841, the Court merely gives its opinion on the record as it then stands. The objection can only be finally disposed of at the hearing, when the record and evidence are complete.

Form of order in such case.  
Costs reserved. *Ibid.*

#### OFFICE COPIES.

*See DEPOSITIONS, 1.*

#### OPTION.

*See PARTNERSHIP, 6.*

#### ORDER OF COURSE.

1. The Plaintiff submitted to a demurrer by omitting to set it down within twelve days, and the V. C. ordered him to pay the costs of suit. The Plaintiff afterwards obtained at the Rolls an order of

*U u 4* course

course to amend, suppressing in his petition the order of the Vice-Chancellor. It was discharged for irregularity on the ground of the suppression. *Cartwright v. Smith.* Page 121

2. The Plaintiff, upon filing a demurrer wrote to say he submitted thereto, and would obtain an order to amend. More than two months afterwards, he obtained an order, as of course, to amend, it was discharged for irregularity. *Hearn v. Way.* 368

3. A Defendant obtained a reference under the contempt act, to inquire whether by poverty he was unable to answer. The Master reported in the negative. By an order of the Vice-Chancellor the bill was taken *pro confesso*, without prejudice to the Defendant applying within ten days to put in his answer. The Defendant, suppressing the previous circumstances, then obtained an order of course for leave to defend *in formd pauperis*. The order was discharged. *Nowell v. Whitaker.* 407

4. An application for an order of course should state all the material facts. If there be any suppression, the order will be discharged, and the Court will not, on the application to discharge it, support it on the special merits then, for the first time, appearing. *St. Victor v. Devereux.* 584

5. A Plaintiff claiming partly under the heirs of a *French* subject, and, through an instrumen of doubtful construction, obtained an order of course at the Rolls to sue *in formd pauperis*, upon the simple allegation of his poverty. Held, that the order was irregular, on the ground of the suppression of the facts, which ought to have been presented for the consideration of the Court upon the application. *St. Victor v. Devereux.* Page 584

6. On an application to the Master of the Rolls in a Vice-Chancellor's cause, to discharge an order of course obtained at the Rolls, the Court will not enter into the merits further than is necessary to determine whether the order was regularly obtained. *Ibid.* *See LUNACY*, 1.

#### ORDER TO REVIVE.

A cause came on in 1839, and was ordered to stand over for want of parties. A bill of revivor and supplement was afterwards filed, stating that *A.* the sole Plaintiff, had died in 1838, insisting that the order of 1839 was a nullity, and praying a revivor. A common *ex parte* order to revive was obtained on petition, placing the cause "in the same plight and condition as at the death of *A.*" The Defendant moved to discharge the order on the ground that the order of 1839 must be discharged before the cause could be put in the same plight as at the alleged death of *A.* Held, however, that it was regular. *Egremont v. Cowell.* 408

#### ORGAN.

## ORGAN.

*See MORTMAIN*, 1.

## OUTLAWRY.

An information was filed by the Attorney-General at the relation of *A. B.*, to set aside a fraudulent deed executed by an outlaw in a civil action, between the judgment and inquisition. Held, that statements shewing the interest of the relators and the motives for the execution of the deeds, as against the creditors, were not impertinent. *The Attorney-General v. Rickards.* Page 444

## OUTSTANDING TERM.

*See EJECTMENT BILL*, 1.

## PARENT AND CHILD.

*See EQUITY TO SETTLEMENT.*

## PARTIES.

1. One of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, and prayed an account of the payments of the bond. Held, that the principal debtor and the co-surety were necessary parties, notwithstanding the 32d Order of August 1841. *Allan v. Houlden.* 148

2. Upon a bill for a general account between *A.* and *B.*, a question

arose as to three items, whether they ought to be charged against *A.* or against *C.* with whom *A.* and *B.* had had some mutual dealings. Held, that *C.* was not a necessary party to the suit. *Darthez v. Clemens.* Page 165

3. *A.* covenanted with *B.* to transfer stock into the names of *C.* and *D.*, or some other person to be named by *A.*, upon trust for *B.*, his wife and issue. Afterwards *B.* became absolutely entitled to the fund. In a suit by *B.* against the representatives of *A.* to obtain satisfaction out of his estates in respect of the covenant, Held, that *C.* and *D.* were not necessary parties. *Watson v. Parker.* 283

4. Certain persons were properly made parties to a suit previous to the orders of August 1841, which made them no longer necessary parties. Held, that they might properly be dismissed at the subsequent hearing. *Tarbuck v. Greenall.* 358

*See OBJECTION FOR WANT OF PARTIES.*

## PARTITION.

1. Independently of the 4 & 5 Vict. c. 95. s. 85., this Court has no jurisdiction to direct the partition of copyholds, nor of customary freeholds. *Jope v. Morshead.* 213

2. On a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court

Court will grant an inquiry; but where there is a material omission in the proof of the Plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the Plaintiff had recovered in ejectment a portion of the estate from the Defendant, it not appearing what were the circumstances of that proceeding, or whether the Plaintiff's title, as alleged, was therein proved. *Jope v. Morshead.* Page 213

3. On a suit previous to the 4 & 5 Vict. c. 35. s. 85. for a partition of freeholds and copyholds, the Court directed the copyholds to be allotted in entirety to one of the parties. *Dillon v. Coppin.* 217. n.

*See EJECTMENT BILL, 1.*

#### PARTNER.

1. Upon a question whether one partner had notice of the irregular course of dealing of his co-partner to the prejudice of their customer, the Court was of opinion, that he ought to be deemed to have known the facts, it appearing from the evidence, that if he had used ordinary diligence and attention in the management of the business, he might and must have discovered all the material facts: that the means of knowledge were within his power: that he would, with very little trouble, have found confusion and irregularity in the accounts, a proper investigation of the sources of

which would have led to discovery of all that had been done. Held also, that under such circumstances the Court, for the protection of those who deal with partnerships, must impute the knowledge which the partners, acting for their interests and in discharge of their plain duty, might and ought to have obtained. *Sadler v. Lee.*

Page 324

2. Difficulty in holding a partner, who ostensibly takes an active part in the conduct of the business, free from responsibility, on the ground of insanity, in respect of the acts of the firm. *Ibid.*

3. Confirmed and incurable insanity is a ground for dissolving a partnership, but a mere diminution of capacity in attending to it is insufficient for that purpose. *Ibid.*

4. A surviving partner being the executor of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease, for the benefit of the estate; nor is an executor and legatee of such surviving partner. *Stocken v. Dawson.* 371

*See PARTNERSHIP.*

#### PARTNERSHIP.

1. A stipulation that interest should be allowed on the capital of partners presumed under the circumstances. *Millar v. Craig.* 433

2. In a partnership between *A.* and *B.* interest was allowed on the capitals. *C.*, who was a clerk and relative, was cognizant of the terms

terms on which this partnership was carried on. *B.* retired, and *A.* and *C.* continued the business: the whole capital embarked therein belonged to *A.* There was an absence of all proof of any agreement between *A.* and *C.* in respect of interest on capital. *D.* and *E.* were afterwards admitted into the business, and an interest account of capital was then resumed. Held, under these circumstances, and from the knowledge that *C.* had of the terms on which the first partnership had been carried on, that it must be assumed that interest on capital was to be allowed in the second partnership. *Millar v. Craig.*

Page 493

3. Partnership accounts having been directed to be taken by the Master, in a case in which some of the books had been lost, the Court directed the Master, if it should appear that in taking the account any necessary books, &c. should be wanting, to report the same specially; and whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts. *Ibid.*

4. Difficulties in appointing a receiver of a partnership upon motion. *Madgwick v. Wimble.* 495

5. Surviving partners insisted on continuing the partnership with the assets of a deceased partner. The Court thought the representatives of the latter entitled to a receiver. *Ibid.*

6. Partnership stipulation, that a son of one partner, or in case of his minority, the executor should, on the death of such partner, succeed to his share. The Court, on the terms of the partnership deed, considered it an option, and not an obligation. *Madgwick v. Wimble.* Page 495

#### PAUPER.

*See ORDER OF COURSE, 3. 5, 6.*

#### PAYMENT INTO COURT.

A trustee admitted he had sold out trust stock, but he stated that he had invested the produce in other securities. A motion was made before decree, that he might repurchase the stock and transfer it into Court. Held, that the Court could make no such order. *Futter v. Jackson.* 424

*See RECEIVER, 1, 2.*

#### PAYMENT OF CONSIDERATION MONEY.

In a defence founded upon an allegation that the Plaintiff has released or assigned his rights for a pecuniary consideration paid to him, it is incumbent on the Defendant to prove that the consideration was in fact paid. *Van-daleur v. Blagrave.* 565

#### PAYMENT OUT OF COURT.

Under a decree in an administration suit, certain parties only were allowed to attend before the Master.

Master. The Master approved of some suits being instituted by the receiver, who was to be indemnified out of the estate. The funds appearing by affidavit to be "abundantly ample," the Court ordered the institution of the suits, and the payment of costs out of the fund standing to the general credit of the cause, upon service on those only whom the Master had authorized to attend him on the reference. *Lockhart v. Hardy.* Page 267

#### PENALTIES.

Where a Plaintiff, by his bill, seeks a discovery of matters which might subject the Defendant to a criminal prosecution and also seeks other legitimate discovery, it is his duty to separate the two; for if they be so mixed up or connected, that either by inference or exclusion they may lead to a disclosure which might subject the Defendant to prosecution, he is not bound to answer any portion of it. *The Earl of Lichfield v. Bond.* 88

#### PETITION.

The Court has no authority, upon a petition by a client against his solicitor, to give relief founded on a special agreement. *Alexander v. Anderon.* 405

#### PIRACY.

The ground on which the Court protects trade marks is, that it

will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other *indicæ* by which he may pass off his own goods to purchasers as the manufacture of another person. *Perry v. Truefit.* Page 66

See INJUNCTION, 1.

TRADE MARKS, 2.

#### PLEADING.

1. A foreign sovereign prince, who was also an *English* peer, was made a Defendant to a suit, and served with a letter missive. The Lord Chancellor refused to recall it. The Defendant then appeared, and filed a demurrer for want of jurisdiction. Held, first, that the Lord Chancellor had not decided that the Defendant was liable to the jurisdiction of the Court; and, secondly, that the Defendant had not, by appearing, waived any defence to the bill. *The Duke of Brunswick v. The King of Hanover.* 1
2. In a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew a case rendering the sovereign prince liable to be sued as a subject. *Ibid.*
3. A simple allegation that a foreign instrument depending on foreign law is null and void, is too vague. *Ibid.*
4. Where a bill for an account which relies on certain items as the ground for transferring the matter

matter from the jurisdiction of a court of law to that of equity, also contains a general vague charge of there being voluminous and intricate accounts between the parties; then, if the Plaintiff fails in supporting his equity upon the particular items, he cannot maintain the bill against a demurrer upon the latter vague charges. *Darthez v. Clemens.*

Page 165

5. Upon a bill for a general account between *A.* and *B.*, a question arose as to three items, whether they ought to be charged against *A.* or against *C.*, with whom *A.* and *B.* had had some mutual dealings. Held, that *C.* was not a necessary party to the suit. *Ibid.*
6. On a bill seeking to set aside deeds *in toto*, and praying no alternative relief, the Court will not, adversely, grant an account on the footing of their validity. *Selby v. Jackson.* 192
7. Mortgagee in possession, claiming upon a bill for redemption, to be allowed for substantial repairs and lasting improvement, but adducing no proof of any such expenditure, held not entitled to any inquiry on the subject. *Sandon v. Hooper.* 246

*See BILL OF REVIEW.*

CROSS BILL.

DECREE, 4.

EJECTMENT BILL, 2.

GAMING.

IMPERTINENCE, 2.

INQUIRY.

PARTIES, 1. 3.

## POLITICAL AND STATE TRANSACTIONS.

*See FOREIGN LAW, 1, 2.*

## POWER TO ALTER.

Husband and wife had a power to sell real estates, with the consent of the trustees; the monies were, with all convenient speed, to be laid out in the purchase of other lands; and until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money in government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security. Held, that the trustees were liable for the stock which the money would have produced in 1816. Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase-money. *Watts v. Girdlestone.*

Page 188

## PRACTICE.

A foreign sovereign prince, who was also an *English* peer, was made a Defendant to a suit and served with a letter missive. The Lord Chancellor refused to recall it. The Defendant then appeared, and filed a demurrer for want of jurisdiction. Held, first, that the Lord Chancellor had not decided that

that the Defendant was liable to the jurisdiction of the Court; and, secondly, that the Defendant had not, by appearing, waived any defence to the bill. *The Duke of Brunswick v. The King of Hanover.* Page 1

*See ACTION AT LAW.*

AFFIDAVITS.  
AMENDMENT.  
ANSWER.  
APPORTIONMENT OF COSTS.  
AUTHORITY TO SUE.  
BILL OF REVIEW.  
CHARITY, 8.  
COMMISSION.  
CONTEMPT.  
COSTS.  
CREDITOR'S SUIT.  
DECREE, 2, 3, 4.  
DECREE BY DEFAULT.  
DEED, 1.  
DEMURRER.  
DEPOSITIONS.  
ENTERING APPEARANCE.  
EVIDENCE.  
EXCEPTIONS.  
EXECUTOR, 1, 2.  
EXTENDING INJUNCTION.  
FORMÂ PAUPERIS.  
FOUR DAY ORDER.  
GENERAL ORDERS.  
GUARDIAN.  
IMPERTINENCE.  
INJUNCTION, 1, 4.  
INQUIRY.  
IRREGULARITY.  
LUNACY, 1.  
MAINTENANCE.  
MASTER'S OFFICE.  
NEXT FRIEND, 1.  
NOTICE OF MOTION.

*See OBJECTION FOR WANT OF PARTIES.*

ORDER OF COURSE.  
ORDER TO REVIVE.  
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PAYMENT INTO COURT.  
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PRIVILEGED COMMUNICATIONS.  
PRO CONFESSO.  
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PROLIXITY.  
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REVIVOR.  
SALE UNDER COURT.  
SECURITY FOR COSTS.  
SET OFF, 2, 3.  
SIX CLERK.  
SOLICITOR AND CLIENT, 4.  
SPECIAL LEAVE.  
STATE OF FACTS.  
STOP ORDER.  
SUBPOENA TO ANSWER.  
SUPPRESSION OF DEPOSITIONS.  
TAKING BILL OFF FILE.  
TAXATION.  
TAXING MASTER.  
TIME TO ANSWER.  
TRaversing ORDER, 2.  
WITNESS.

#### PRINCIPAL AND SURETY.

1. *A.* became surety for *B.* to *C.* for a sum "for value received by a draft at three months' date." *C.* (without the concurrence of *A.*) at once paid the amount to *B.*, instead of giving the draft at three months. Held, that the agreement had been varied, and that the surety

surety was therefore discharged.  
*Bonser v. Cox.* Page 110

2. One of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, and prayed an account of the payments of the bond. Held, that the principal debtor and the co-surety were necessary parties, notwithstanding the 32d Order of August 1841. *Allan v. Houlden.*

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## PRIORITY OF CHARGE.

*A. B.* was entitled to a legacy, which was charged on real estates devised to *C. D.* *A. B.* by a deed to which *C. D.* was a party, and which recited that it had been agreed that the legacy should remain on the security of the estate, assigned it to *E. F.* *A. B.*, without the concurrence of *E. F.*, afterwards released the charge upon the estate, and *A. B.* and *C. D.* together afterwards mortgaged the estates, first to Lord *C.*, and afterwards to the Plaintiff, a judgment creditor, who released his judgment. Held, that the Plaintiff had priority over *E. F.* *Greenwood v. Churchill.* 314

*See EQUITABLE MORTGAGE.*

## PRIVILEGED COMMUNICATIONS.

1. *A.* and *B.* claimed an estate adversely, as heirs *ex parte paterna*, and *C.* claimed the estate as heir *ex parte materna*. In a suit by *A.*

against *B.* to set aside a compromise entered into between them, *B.* admitted he had in his possession cases submitted for the opinion of counsel after *C.*'s adverse claim, and in contemplation of legal proceedings. Held, that they were not privileged. *Holmes v. Baddeley.* Page 521

2. In the same case, the Defendant *B.* stated that *A.* and *C.* had entered into some compromise to share the proceeds of the estate, and that he believed, that the suit was carried on by *A.* for the benefit and in concert with *C.* Held, that this did not relieve *B.* from the obligation to produce the cases. (Since reversed.) *Ibid.*

## PRO CONFESSO.

Where a bill is taken *pro confesso*, under the 11th Order of April 1842, the Plaintiff is not entitled to such decree as he can abide by, but to such decree only as he is entitled to on the record. *Stanley v. Bond.* 421

*See Costs, 7.*

## PRODUCTION OF DOCUMENTS.

1. Where deeds are impeached for fraud, the mere allegation of fraud by the bill will not entitle the Plaintiff to an order for their production; on the other hand, in order to obtain a production, it is not necessary that the fraud should be admitted by the answer, the Court

Court must look at the circumstances of each case. *Bassford v. Blakesley.* 131

2. Order made for the production of a deed impeached for fraud, though the fraud was denied by the answer, the case on the whole being such as to render an inspection proper. *Ibid.*

3. An admission of the possession by an agent on behalf of the Defendant and other persons who are not parties to the cause, of documents relating to the matters in question, does not entitle the Plaintiff to an order for their production. *Lopez v. Deacon.* 254

4. A Plaintiff does not, by obtaining an order to amend, between the time of giving notice of a motion for the production of documents and its being heard, deprive himself of his right to their production. *Chidwick v. Prebble.* 264

5. A correspondence took place between a client and his solicitor during the progress of a suit. A compromise was effected, but afterwards a second suit was instituted to set it aside, and to prosecute the original suit. Held, that the correspondence was privileged in the second suit. *Hughes v. Garnons.* 352

6. *A.* and *B.* claimed an estate adversely, as heirs *ex parte paterna*, and *C.* claimed the estate as heir *ex parte materna*. In a suit by *A.* against *B.* to set aside a compromise entered into between them, *B.* admitted he had in his possession cases submitted for the opinion of counsel after *C.*'s adverse claim, and in contemplation of legal proceedings. Held, that they were not privileged. *Holmes v. Baddeley.* Page 521

7. In the same case, the Defendant *B.* stated, that *A.* and *C.* had entered into some compromise to share the proceeds of the estate, and that he believed, that the suit was carried on by *A.* for the benefit and in concert with *C.* Held, that this did not relieve *B.* from the obligation of production of the cases. (Since reversed.) *Ibid.*

*See GENERAL ORDERS, 4.*

**PROLIXITY.**

A Plaintiff may call for information of a very minute character, which the Defendant is bound in duty to afford, yet he may do it in such a way as to amount to what is called impertinence, or prolixity amounting to impertinence. *Marshall v. Mellersh.* 558

*See IMPERTINENCE.*

**PROMISSORY NOTE.**

*See BREACH OF TRUST, 18.*

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**REAL AND PERSONAL ESTATE.**

A testator gave his daughter a sum of money, and directed his executors, "as soon as convenient after his decease, to purchase an estate,"

estate," and when she attained twenty-one she was to receive the money if the land was not bought. There was a gift over. The estate was not purchased, and she invested the money in the funds. Held, on the daughter's death, that the money was impressed with the character of realty, and passed as such. *Simpson v. Ashworth.*

Page 412

*See EXONERATION.*

#### RECEIVER.

1. In 1812 the executors of a receiver applied to pass his accounts and pay in the balance, this was ordered, but payment was not made. In 1841 they were ordered to pay in the balance without interest, and it was held that they could not object the want of assets. *Gurden v. Badcock.* 157
2. *A.* was appointed receiver, but the solicitor in the cause alone acted and paid over the rents to the tenant for life. An incumbrancer compelled the receiver to pay the same amount into Court and after payment of his claim, there remained a surplus, which was paid to the tenant for life. Held, that *A.* could not, on petition, obtain repayment by the tenant for life or out of the estates. *Ibid.*

3. Difficulties in appointing a receiver of a partnership upon motion. *Madgwick v. Wimble.* 495
4. Surviving partners insisted on continuing the partnership with

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the assets of a deceased partner. The Court thought the representatives of the latter entitled to a receiver. *Madgwick v. Wimble.* Page 495

#### REDEMPTION.

*See MORTGAGOR AND MORTGAGEE, 2, 3, 4.*

#### RE-ENTRY, RIGHT OF.

King *Charles the Second*, by letters patent, granted some property in fee, subject to a fee farm rent, and to a proviso of re-entry, in case a decree should be made at the suit of the King for repairing the property, and the same should afterwards remain for a year out of repair. The Crown afterwards granted away the rent. Held, that the proviso for re-entry could not be exercised, and that it therefore formed no objection to the title to the property. *Flower v. Hartopp.* 476

#### REFERENCE.

The Court, if perfectly satisfied, will make an order to transfer under the Trustee Act without a reference. *Cockell v. Pugh.* 293

#### RELEASE.

1. An account was settled, and leases executed, between the residuary legatees of a partner and the representatives of the surviving partner. Numerous and important errors in the account having been proved, the release was set aside,

X x

aside, but having regard to the lapse of time, and the loss of books and documents, the Court declined opening the accounts altogether, but gave liberty only to surcharge and falsify. *Millar v. Craig.* Page 433

2. Where a release has been executed, and the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question, whether the release was fairly obtained. *Ibid.*

3. A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item in which he was interested, having, by mistake, been omitted in the account. Held, that he was entitled to relief, but that to obtain it, the release must be wholly set aside. *Pritt v. Clay.* 503

4. *A. B.*, the representative of a deceased partner, having filed his bill against *C. D.*, the surviving partner, for an account, *A. B.*, in consideration of 500*l.*, released *C. D.* from all claims, and the bill was dismissed. By mutual error a debt of 2000*l.* owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties; *C. D.* afterwards received it. Held, that *A. B.*, notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be re-opened. *Pritt v. Clay.* Page 503

5. Grantor of an annuity entrusted *Y.* with a sum of money for the purpose of redeeming it. *Y.*, without paying the money, obtained from the grantee a deed of release of the annuity. *Y.* who acted in some respects as agent of both parties; afterwards died insolvent. Held, under the particular circumstances, that the loss must be borne by the grantor. *Vandaleur v. Blaggrave.* 565

6. The Defendant granted to the Plaintiff an annuity, redeemable on six months' notice or on payment of a fine. In *May* 1830, notice was given to re-purchase in *November*, and in *August* 1830, the Defendant entrusted *Yates* with the money for the repurchase. In *October* *Yates* prevailed on the Plaintiff to execute the deed of re-assignment, indorsed on the annuity deed, which was dated in *November*, without receiving the re-purchase money; but the Plaintiff did not sign any receipt for the money. *Yates* afterwards produced the deed to the son of the Defendant, to satisfy him of the payment, and it was handed back to *Yates* to be kept by him, with the Defendant's other documents. *Yates* acted in the transaction as agent of both parties. He retained the money, and to deceive both parties,

parties, he continued the payment of the annuity, but afterwards died insolvent. The Defendant subsequently obtained possession of the deed. Held, under the circumstances, that the Defendant was not discharged, but was bound to pay to the Plaintiff the re-purchase money with interest from November 1830, the Plaintiff accounting for the subsequent receipts of the annuity. *Vandaleur v. Blagrave.* Page 565

*See PAYMENT OF CONSIDERATION MONEY.*

**PRINCIPAL AND SURETY, 1.**

**REPAIRS.**

*See MORTGAGOR AND MORTGAGEE, 3, 4.*

**RETAINER.**

*See AUTHORITY TO SUE.*

**NEXT FRIEND.**

*SOLICITOR AND CLIENT, 3.*

**REVIVOR.**

A cause came on in 1839, and was ordered to stand over for want of parties. A bill of revivor and supplement was afterwards filed, stating that *A.* the sole Plaintiff, had died in 1838, insisting that the order of 1839 was a nullity, and praying a revivor. A common *ex parte* order to revive was obtained on petition, placing the cause "in the same plight and condition as at the death of *A.*"

The Defendant moved to discharge the order on the ground that the order of 1839 must be discharged before the cause could be put in the same plight as at the alleged death of *A.* Held, however, that it was regular. *Egremont v. Cowell.* Page 408

**RIGHT TO BEGIN.**

*See OBJECTION FOR WANT OF PARTIES, 1.*

**SALE OF REAL ESTATE.**

*See INFANT, 1.*

**SALE UNDER COURT.**

Where property is sold under a decree, and there is jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale, or prevent a good title from being made under the decree. *Calvert v. Godfrey.* 97

*See Costs, 2.*

**SECURITY FOR COSTS.**

1. Liberty given to sue on a bond given to the late Six Clerks, as a security for costs upon a proper indemnity. *Robinson v. Bruton.* 147
2. In a Vice-Chancellor's cause, the Plaintiffs described themselves as resident abroad. The Defendants obtained *ex parte* at the Rolls, an order

order for security for costs. An application to the Master of the Rolls to discharge it, on the ground that the Defendants had in their hands funds belonging to the Plaintiffs sufficient to indemnify them, was refused, because there was no irregularity in the order, and the cause being attached to the Vice-Chancellor's Court, the Master of the Rolls could not enter into the merits. *Hooper v. Paver.* Page 173

**SERJEANT-AT-ARMS.**

*See GENERAL ORDERS, 4.*

**SERVICE.**

*See FOUR DAY ORDER.*

**SERVICE OF NOTICE OF MOTION.**

*See SOLICITOR AND CLIENT, 10.*

**SERVICE OF PETITION.**

*See PAYMENT OUT OF COURT.*

**SET OFF.**

1. Costs receivable and payable by two parties, ordered to be mutually set off, without regard to the lien of the solicitors. *Cattell v. Simons.* 304
2. The Master of the Rolls has jurisdiction to direct costs which have been ordered by the Lord Chancellor to be paid by the Defendant to the Plaintiff, to be set off against costs ordered by the Mas-

ter of the Rolls, to be paid by the Plaintiff to the Defendant. The order may be obtained on motion, and the notice of motion may be given before the taxation. *Cattell v. Simons.* Page 304

3. The Lord Chancellor on the 8th of *November* ordered the Defendant to pay costs to the Plaintiff, but the order was not completed till the 23d of *December*. The Master of the Rolls on the 15th of *December* ordered the Plaintiff to pay costs to the Defendant, and on the 19th the Plaintiff offered to set off the costs. The Defendant in *January* following issued an attachment for the costs: Held, that the Plaintiff, notwithstanding he was in contempt, might, under these circumstances, move to set off the costs. *Ibid.*

**SETTING ASIDE DEEDS.**

1. The Court, under the circumstances of the case, refused to set aside deeds executed by one under restraint in a lunatic asylum, under medical certificates. *Selby v. Jackson.* 192
2. When a party, without authority, but *bond fide*, assumes the management of the property of one mentally incompetent, this Court will not, on his recovery, restore to him his property without making an equitable allowance for the expenses and liabilities. *Selby v. Jackson.* 192
3. Where a release has been executed, and the parties have for a long space of time acquiesced in it, the

the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question, whether the release was fairly obtained. *Millar v. Craig.*

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*See RELEASE, 1, 3, 4.*

#### SETTLED ACCOUNT.

An account was settled, and releases executed between the residuary legatees of a partner and the representatives of the surviving partner. Numerous and important errors in the account having been proved, the release was set aside, but having regard to the lapse of time, and the loss of books and documents, the Court declined opening the accounts altogether, but gave liberty only to surcharge and falsify. *Millar v. Craig.*

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*See RELEASE, 1, 2, 3, 4.*

#### SEVERANCE.

*See Costs, 3.*

#### SIX CLERK.

Liberty given to sue on a bond given to the late Six Clerks, as a security for costs upon a proper indemnity. *Robinson v. Bruton.*

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#### SOLICITOR AND CLIENT.

1. A petition was presented in the names of *A.* and *B.*, but without the authority of *A.* Held, that having regard to the rights of the respondents, the petition could not be ordered to be taken off the file on the application of *A.* *Tarbuck v. Tarbuck.* Page 134
2. A bill being filed without the written authority of one of several co-Plaintiffs, and the evidence being unsatisfactory as to the retainer, his name was struck out as co-Plaintiff with costs to be paid by the solicitor. *Pinner v. Knights.* 174
3. Where a solicitor files a bill without a written authority, the *onus* of proof is cast on him. If there be any doubt on the matter, the Court will hold him liable. *Ibid.*
4. A bill filed without the authority of the Plaintiff, was dismissed with costs, and the Plaintiff was taken under an attachment for non-payment of costs. The Court, on motion, ordered the solicitor to indemnify *A.*, but refused to release *A.* as against the claim of the Defendants. Held also, that *A.* was not, on such an application, to be deprived of his right against the solicitor to damages for his imprisonment. *Hood v. Phillips.* 176
5. The name of a person who had been made the next friend of an infant Plaintiff without his authority,

*X s 3* rity,

rity, ordered to be struck out, but liberty was given to the co-Plaintiffs to amend by naming a new next friend. *Ward v. Ward.*

Page 251

6. As to the liability of the next friend in such a case as regards the Defendant. *Ibid.*

7. Solicitor struck off the rolls for fraudulently abusing the confidence of his client. *In re Martin.*

337

8. It is the duty of the Court to protect solicitors in the fair discharge of their difficult and delicate duties, but when a solicitor is found to have availed himself of his honourable and confidential position, for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those privileges, and that certificate of character, which are afforded by his being permitted to remain on the roll of solicitors.

*Ibid.*

9. The Court has no authority, upon a petition by a client against his solicitor, to give relief founded on a special agreement. *Alexander v. Anderdon.* 405

10. A suit was prosecuted through a solicitor, and, as the Plaintiffs alleged, without their authority. The Defendant gave notice of motion to dismiss the bill for want of prosecution, which being served on the solicitor, he requested the Plaintiffs to name a new solicitor, which they refused to do. The solicitor then moved that he might

be dismissed as solicitor. Held, that no such order could be made, but personal service on the Plaintiffs of the notice of motion to dismiss was ordered. The Plaintiffs took no step to relieve themselves from their liability. Held, that the Defendant was entitled to have the bill dismissed, with costs to be paid by the Plaintiffs, leaving them to obtain, as against the solicitor, any remedy they might have. *Tarbuck v. Woodcock.*

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See PRODUCTION OF DOCUMENTS, 5.  
SET OFF.  
TAXATION, 1.

#### SPECIAL LEAVE.

A Plaintiff cannot, before appearance, serve a notice of motion on the Defendant, without first obtaining the special leave of the Court, and the notice of motion should state that such leave has been given. *Jacklin v. Wilkins.*

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#### SPECIALTY DEBT.

See ADMINISTRATION BOND.

#### SPECIFIC PERFORMANCE.

- Even after great delay and acquiescence, the Court will not compel a purchaser to complete, if the title appears to be manifestly bad. *Blackford v. Kirkpatrick.* 232
- A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase money, retain

retain a private debt due to him from the trustee. On a bill by the trustee: Held, that this Court would not decree the specific performance of such a contract. *Thompson v. Blackstone.* Page 470

3. In cases of specific performance, courts of equity exercise a discretion. In cases of great hardship, they will not interfere, but will leave the Plaintiff to his remedy by recovery of damages at law. *Wedgwood v. Adams.* 600

4. Trustees joined their *cestui que trust* in a contract for sale, and personally agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear, whether the purchase money would be sufficient to discharge them, or what would be the extent of the deficiency. The Court refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages.

*Ibid.*

*See INFANT, 2.*

#### STATE OF FACTS.

1. Where a party takes his state of facts into the Master's office, and obtains leave to examine witnesses and completes the examination, his opponent's state of facts may, at any time before publication, be amended by leave of the Master. *Earl Nelson v. Lord Bridport.*

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2. The Plaintiff and Defendant took their states of facts into the Master's office. The Plaintiff completed the examination of his witnesses, and was about to obtain an order to pass publication, when the Defendant, with the Master's permission, carried into the Master's office an amended state of facts. Held, not irregular, and a motion in the alternative to suppress it and the subsequent proceedings, or that the Defendant might pay the costs occasioned, was refused with costs. *Earl Nelson v. Lord Bridport.* Page 295

#### STATUTE.

1. The Crown, in consideration of the past services of the town, the situation and importance of the place, the injury and damage to be expected from the King's enemies, from the current of water, and from the traffic on the bridges, and the ruin likely to take place, if the means of repairing were not provided, granted certain tolls to the corporation of *Shrewsbury*, to be applied in reparation of the bridges and walls, without yielding any account or reckoning thereof. Held, that the grant was not made to the corporation for its own benefit only as a reward for prior services: that it was the duty of the corporation to apply so much of the receipts as might be required for the purposes stated: that this was a gift for a public

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and

and general purpose for the benefit of the town, in aid of a general charge or burden to which the burgesses and inhabitants of the town were liable, and that it was a gift to charitable uses under the statute of *Elizabeth*, and was therefore subject to the jurisdiction of this Court. *The Attorney-General v. The Corporation of Shrewsbury.*

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- 2. A widow, as such, cannot take under a limitation to the next of kin of her husband, according to the Statute of Distributions. *Cholmondeley v. Lord Ashburton.* 86
- 3. In a marriage settlement, the ultimate limitation of a fund was to such persons "as would, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the statute for the distribution of personal estate of persons dying intestate, if the husband had died intestate without having been married to *A.*," his wife. The wife died, and the husband married again and died: Held, that his widow took nothing under this limitation. *Ibid.*
- 4. Contract for the purchase of tithes not signed by the party chargeable, held, under the circumstances, to have been taken out of the Statute of Frauds. *Blachford v. Kirkpatrick.* 232
- 5. (1 *W. 4. c. 60.*) A trader who had a freehold, copyhold, and personal estate, died in *September 1832*, leaving an infant heir. His estate was insufficient to pay his debts

and charges. His partners, however, by deed, took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, and the Master found that it would be for the benefit of the infant heir, that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 1 *W. 4. c. 60.* Held, that the Court had no jurisdiction to order the sale; and that the infant was not a trustee within the act. *Calvert v. Godfrey.*

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- 6. (1 *W. 4. c. 60.*) The executor of a surviving trustee declined stating whether he would or not prove the will, and neglected for thirty-one days after notice to transfer trust stock standing in the name of his testator. Held, that he was a trustee within the 1 *W. 4. c. 60.*, and a transfer was ordered to new trustees. *Cockell v. Pugh.* 293
- 7. (1 & 2 *Vict. c. 110.*) By the decree the lands of the Defendant were declared chargeable with 40*l.* a year, and the Master was directed to take an account of the arrears, and the Defendant was ordered to pay what should be found due. Held, that the Defendant was not, under the 1 & 2 *Vict. c. 110. ss. 17, 18.*, liable to pay interest on the amount found due, from the date of the decree

decree to the date of the Master's report. *The Attorney-General v. Lord Carrington.* Page 454

8. (4 & 5 Vict. c.35.) Independently of the 4 & 5 Vict. c. 35. s. 85., this Court has no jurisdiction to direct the partition of copyholds, nor of customary freeholds. *Jope v. Morshead.* 213

*See ADMINISTRATION BOND.  
DEED, 4.*

#### STATUTE OF CHARITABLE USES.

*See STATUTE, 1.*

#### STATUTE OF DISTRIBUTIONS.

*See STATUTE, 2, 3.*

#### STATUTE OF FRAUDS.

*See STATUTE, 4.*

#### STAYING PROCEEDINGS.

*See CREDITOR'S SUIT.*

#### STOCK BROKER.

*See TRANSFER OF STOCK.*

#### STOCK IN TRADE.

A husband carried on the business of a victualler with stock, &c., which formed the separate estate

of the wife; in carrying on the business he disposed of the consumable stock, and substituted similar articles, and at a subsequent period he sold the stock and business. By the decree an account was directed against the husband of the stock comprised in the settlement and sold. Held, that the Master properly included the substituted stock in the account. *England v. Downs.*

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#### STOP ORDER.

At the instance of the mortgagees of the reversion, the Court declined making a stop order on deeds brought into the Master's office under a decree. *Cotton v. Colton.*

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#### STOPPAGE IN TRANSITU.

1. In equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage *in transitu, ultra* the particular lien of the transferee. *Spalding v. Ruding.* 376

2. A. consigned goods of the value of 1800*l.* to B., who transferred the bill of lading to C. to secure 1000*l.* B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title to stop *in transitu*, a right to retain the whole in satisfaction of a general balance due to him from B. Held, first, that he was not entitled beyond the 1000*l.*;

1000*l.*; and, secondly, that *A*'s remedy against *C*. for the surplus was in equity. *Spalding v. Ruding.* Page 976

#### STRIKING OFF ROLLS.

1. Solicitor struck off the rolls for fraudulently abusing the confidence of his client. *In re Martin.* 337

2. It is the duty of the Court to protect solicitors in the fair discharge of their difficult and delicate duties, but when a solicitor is found to have availed himself of his honourable and confidential position, for the purpose of taking advantage of and defrauding his clients, it is not less the duty of the Court to withdraw from him those privileges, and that certificate of character, which are afforded by his being permitted to remain on the roll of solicitors.

*Ibid.*

#### SUBPENA TO ANSWER.

Where the bill is amended before answer, it is not necessary to serve a *subpeana* to answer the amendments. *Stanley v. Bond.* 420

#### SUBSTITUTED GIFT.

1. Bequest to *A*. for life, and after her decease to the testator's "four children, the survivor or survivors of them equally, or to their heirs lawfully begotten." One of the four children died in the life of

*A*. Held, that his children took one fourth by way of substitution. *Price v. Lockley.* Page 180

2. Gift of residue to pay income to widow for life, subject to the payment thereout of an annuity of 10*l.* to *A*. for his life. After the decease of his widow, a disposition was made of the property, and amongst other gifts there was one of the dividends of 1000*l.* stock to *A*. for life. Held, that the annuity to *A*. ceased upon the death of the widow, and that *A*. then took the dividends on the 1000*l.* in substitution. *Adnam v. Cole.* 353

3. Bequest to widow for life, and afterwards to transfer to testator's children *then* living, with a gift to the issue of such children, if dead, the issue to take only the share their father would have been entitled to. Held, that the issue took by substitution, and that to entitle them they must survive the tenant for life. *Bennett v. Merriam.* 360

#### SUBSTITUTED PROPERTY.

A husband carried on the business of a victualler with stock, &c. which formed the separate estate of the wife; in carrying on the business he disposed of the consumable stock, and substituted similar articles, and at a subsequent period he sold the stock and business. By the decree, an account was directed against the husband of the stock comprised in the settlement and sold. Held, that the Master properly included the substituted stock

## INDEX TO THE PRINCIPAL MATTERS.

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stock in the account. *England v. Downs.* Page 269

### SUBSTITUTED SERVICE.

Substituted service of an injunction ordered. *Kirkman v. Honnor.*

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*See SOLICITOR AND CLIENT,* 10.

### SUFFICIENCY OF ANSWER.

*See ANSWER,* 3.

GAMING.

IMPERTINENCE.

PROLIXITY.

### SUPPLEMENTAL BILL.

*See BILL OF REVIEW.*

### SUPPRESSION.

*See ORDER OF COURSE,* 4.

### SUPPRESSION OF DEPOSITIONS.

1. Depositions suppressed after publication, on the ground that one of the commissioners was the nephew and agent of the Plaintiff. *Lord Mostyn v. Spencer.* 135
2. The fact of publication having passed, or the death of the witness, will not prevent the suppression of the depositions, when the commissioner is disqualified by interest, provided the application be made within a reasonable time after the discovery of the objection. *Ibid.*

### SURCHARGE AND FALSIFY.

*See RELEASE,* 1.

### SURVIVORSHIP.

1. Bequest to *A.* for life, and after her decease to the testator's "four children, the survivor or survivors of them equally, or to their heirs lawfully begotten." One of the four children died in the life of *A.* Held, that his children took one fourth by way of substitution. *Price v. Lockley.* Page 180

2. *A.* and *B.* were obligors in a joint bond: *A.*, who was alleged to be the principal debtor, died. Held, that his assets were not in equity liable upon the bond, but that the liability survived to *B.* *Richardson v. Horton.* 185

### TAKING BILL OFF FILE.

A bill containing offensive statements ordered, by consent, to be taken off the file. *Jewin v. Taylor.* 120

### TAXATION.

1. Where taxation is directed after action brought, this Court does not give the client the costs of taxation, though more than one-sixth be taxed off. *Toghill v. Grant In re Boord.* 348
2. An information related to two objects, one failed, and the decree dismissed so much of the information as related to it, without costs, and ordered the Defendant to pay the informant his costs of the suit. Held, that the Taxing Master

Master was wrong in apportioning the general costs of suit between the two objects. *The Attorney-General v. Lord Carrington.*

Page 454

3. The Court will not interfere with the discretion of the taxing masters as to the *quantum* of fees to counsel. *Ibid.*
4. Costs of process of contempt for not answering, not allowed in the taxation of costs of suit as between party and party. *Ibid.*

*See SOLICITOR AND CLIENT, 9.*  
**TAXING MASTER.**

#### TAXING MASTER.

The Court will not interfere with the discretion of the taxing masters as to the *quantum* of fees to counsel. *The Attorney-General v. Lord Carrington.* 454

#### TENANT FOR LIFE.

*See ESTATE FOR LIFE.*  
**TRUST, 1.**

#### TIME TO ANSWER.

Where a bill is amended before answer, the Defendant is not entitled to eight weeks from the amendment to answer it. *Stanley v. Bond.* 420

#### TITHES.

The right to the tithes of an allotment generally follows the right to the old tenement, in respect of which the allotment is made. *Blachford v. Kirkpatrick.* 232

#### TITLE.

*See EXCEPTIONS, 2.*

**LEASEHOLDS.**

**VENDOR AND PURCHASER.**

#### TOLLS.

*See CHARITY, 3.*

#### TRADE MARKS.

1. The ground on which the Court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other *indiciae* by which he may pass off his own goods to purchasers as the manufacture of another person. *Perry v. Truefitt.*

Page 66

2. Injunction to restrain a party from making and sending to *Turkey* watches having the Plaintiff's name or the word "warranted" engraved thereon in *Turkish* characters in imitation of the Plaintiff's watches. *Gout v. Alepoglu.*

69 n.

#### TRANSFER OF STOCK.

An executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stock broker for identifying him at the Bank. He was allowed the payment in passing his accounts. *Jones v. Powell.* 488

#### TRAVERSING

## TRAVERSING ORDER.

1. The Plaintiff filed a traversing order. The Defendant afterwards made default in appearing at the hearing. Held, first, that the Plaintiff was not entitled to take, as of course, such decree as he could abide by, but must go through his case and take such decree as to the Court might appear just; and, secondly, that service of the traversing order must be proved by affidavit. *Evans v. Williams.*

Page 118

2. Traversing note, obtained *ex parte* by the Plaintiff, with notice that the Defendant's answer had been sworn, discharged, but the Defendant ordered to pay the costs, *Rigby v. Rigby.* 265

## TRUST.

1. Trustees, with the consent of *A. B.*, the tenant for life, had a power to sell the trust estate, and invest the produce in other real estate. In 1810, *A. B.*, with the concurrence of the trustees, sold the estate for 8440*l.* and received the purchase money. About the same time (but whether with the concurrence of the trustees was not proved), *A. B.* purchased another estate for 17,400*l.* Of the 8440*l.*, 8124*l.* was paid by *A. B.* in part payment for the second estate; the remainder was paid partly out of *A. B.*'s monies, and partly by money raised by a mortgage of the estate. The es-

tate was conveyed to *A. B.* in fee. No acknowledgment or declaration of trust was ever made by *A. B.*, and he retained possession of the estate till thirty years after, when he became bankrupt. The Court, against *A. B.*'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, and held that there had been no such adverse possession, and no such acquiescence on the part of the trustees, as to preclude the Court making a declaration that they had a lien on the estate to the extent of the trust monies invested in its purchase. *Price v. Blakemore.*

Page 507

2. A testator by his will founded a charity, towards which he directed certain and definite sums to be applied, and he devised estates to a company for that purpose. The will contained no express beneficial gift to the company. Held, however, under the circumstances, that the company was entitled to the increased rents of the property after making the fixed payments. *The Attorney General v. The Grocers' Company.* 526

See BREACH OF TRUST.

CHARITY.

CROSS BILL.

PARTIES, 3.

PAYMENT INTO COURT.

TRUSTEE ACT.

VENDOR AND PURCHASER, 10.

TRUSTEE

## TRUSTEE ACT.

1. The executor of a surviving trustee declined stating whether he would or not prove the will, and neglected for thirty-one days after notice to transfer trust stock standing in the name of his testator. Held that he was a trustee within the 1 *W. 4. c. 60.*, and a transfer was ordered to new trustees. *Cockell v. Pugh.* Page 293
2. The Court, if perfectly satisfied, will make an order to transfer under the Trustee Act without a reference. *Ibid.*

## TRUSTEE AND CESTUI QUE TRUST.

1. If trustees are directed to invest trust money on government or real securities, and they do neither, they are answerable, at the option of the *cestuis que trust*, either for the money or the stock which might have been purchased therewith. *Watts v. Girdlestone.* 188
2. Husband and wife had a power to sell real estates, with the consent of the trustees; the monies were, with all convenient speed, to be laid out in the purchase of other lands; and, until a convenient purchase could be effected, it was made lawful for the trustees, with the consent of the husband and wife, to invest the money in government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security.

Held, that the trustees were liable for the stock which the money would have produced in 1816. Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase money. *Watts v. Girdlestone.* Page 188

3. A trustee cannot, by contract, waive his right to resort to the life interest of a tenant for life, for the purpose of replacing a trust fund, which, in breach of trust, he has lent to the tenant for life. *Fuller v. Knight.* 505
4. A trustee, in breach of trust, lent the trust fund to *A. B.*, the tenant for life. The trustee afterwards concurred in a creditors' deed, by which *A. B.*'s life interest was to be applied in payment of his debts, and the trustee received thereunder a debt due to him from *A. B.* Before the other creditors had been paid, the trustee retained the income to make good the breach of trust. Held, upon a bill filed by the trustees of the creditors' deed, that this Court would not prevent such an application. *Ibid.*
5. Where a trustee has trust money in his hands which he is authorised to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing a contemplated mortgage security, in investing the money in exchequer bills. *Matthews v. Brice.* 239
6. A trustee properly invested trust money in exchequer bills, but he left

left them unmarked and undistinguished in the hands of a broker; upon a misapplication of them by the broker: Held, that the trustee was personally liable. *Matthews v. Brise.* Page 299

7. A trustee was empowered to invest in the public funds or on real security. He had in his hands a sum, which, in the interval between receiving and investing in a contemplated real security, he invested in exchequer bills, which he left in the hands of a broker, who misapplied them: Held, that the trustee was liable for the value of the exchequer bills at the time of the loss, and not for the stock which the money would have purchased. *Ibid.*

8. A testatrix gave her personal estate to *A.* and *B.*, subject to debts and legacies, upon certain trusts, and she appointed *A.* alone executor. A fund, over which the testatrix had a power of appointment, was transferred into the names of *A.* and *B.* *A.*, the executor, representing that a considerable part of the fund was wanting to pay debts and legacies, induced *B.* to join in selling out the fund, promising to give a mortgage security for what might not be wanted for debts, &c. *A.* received the whole, but applied a very inconsiderable sum in payment of debts, &c. Held, that *B.* was liable to replace so much of the stock as had not been applied in payment of debts, &c., and to

account for the dividends. *Hewett v. Foster.* Page 259

*See Costs, 4.*

#### UNCERTAINTY.

Bequest of residue to *A.* for life, "and whatever she can transfer to go to her daughters," *B.* and *C.* Held, that the gift to *B.* and *C.* was void for uncertainty. *Flint v. Hughes.* 342

*See PLEADING, 4.*

#### UNCONSCIONABLE BARGAIN

*See FRAUD, 1.*

#### VENDOR AND PURCHASER.

1. Where property is sold under a decree, and there is jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale, or prevent a good title from being made under the decree. *Calvert v. Godfrey.* 97
2. A purchaser under a decree, to whom a good title could not be made, discharged from his purchase, with his costs, charges, and expenses, including the costs of his petition to be discharged. *Ibid.*
3. A trader who had freehold, copyhold,

hold, and personal estate, died in *September 1832*, leaving an infant heir. His estate was insufficient to pay his debts and charges. His partners, however, by deed, took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, and the Master found that it would be for the benefit of the infant heir, that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 1 *W. 4. c. 60.* Held, that a sale under the decree could not be enforced; that the Court had no jurisdiction to order the sale; that the infant was not a trustee within the act; that the purchaser was not bound to wait till the error was corrected, and the Court therefore discharged him with his costs, charges, and expenses. *Calvert v. Godfrey.* Page 97

4. A tenant in possession purchased the property, which was represented to be forty-six feet in depth; it turned out to be thirty-three only: Held, that he was entitled to an abatement. *King v. Wilson.* 124

5. Though time be not of the essence of a contract, it may be made so by notice, where there has been great and improper delay on one side in completing. It may however be waived by proceeding in the purchase after the expiration of the time fixed by the notice. *King v. Wilson.* Page 124

6. Even after great delay and acquiescence, the Court will not compel a purchaser to complete, if the title appears to be manifestly bad. *Blackford v. Kirkpatrick.* 292

7. King *Charles the Second*, by letters patent, granted some property in fee, subject to a fee farm rent, and to a proviso of re-entry, in case a decree should be made at the suit of the King for repairing the property, and the same should afterwards remain for a year out of repair. The Crown afterwards granted away the rent. Held, that the proviso for re-entry could not be exercised, and that it therefore formed no objection to the title to the property. *Flower v. Hartopp.* 476

8. Two houses, held under one lease, were sold separately to *A.* and *B.* The lease was produced and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent between the two purchasers, but did not notice covenants to insure, &c., and a proviso for re-entry on non-performance, contained in the lease. Held, that though *A.* might be evicted by the default of *B.*, still he was, under the circumstances, bound to complete. *Patterson v. Long.* 590

9. In cases of specific performance, courts

courts of equity exercise a discretion. In cases of great hardship, they will not interfere, but will leave the Plaintiff to his remedy by recovery of damages at law.

*Wedgwood v. Adams.* Page 600

10. Trustees joined their *cestui que trust* in a contract for sale, and personally agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear, whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency. The Court refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages. *Ibid.*

*See BREACH OF TRUST, 9, 10, 12, 13.*

**IDENTITY.**

**PARTIES, 3.**

**PAYMENT INTO COURT.**

**TRUSTEE ACT.**

#### **VOLUNTARY COVENANT.**

A voluntary covenant is sufficient to support a creditor's suit against the representatives of the covenantor. *Watson v. Parker.* 288

#### **WAIVER.**

*See PRODUCTION OF DOCUMENTS, 4.*

#### **WIDOW.**

*See NEXT OF KIN, 1, 2.*

#### **WILL.**

*See ABSOLUTE INTEREST, 1.*

**BEQUEST.**

**BREACH OF TRUST, 11.**

**CONVERSION.**

**DEVISE.**

**ESTATE FOR LIFE.**

**ESTATE TAIL.**

**HEIRS.**

**MORTMAIN.**

**SUBSTITUTED GIFT, 3.**

**SURVIVORSHIP, 1.**

**UNCERTAINTY.**

#### **WITNESS.**

Application to the Court to examine on behalf of the Plaintiff, a Defendant, to whose answer a replication had been filed, refused. *Baker v. Thurnall.* Page 333

*See EVIDENCE, 3.*

**END OF THE SIXTH VOLUME.**

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#### ADDENDA ET CORRIGENDA.

Page 21. note (a), for "1 Myl. & K." read "1 R. & Myl."  
23. note (i), add "page 469."  
70. note (a) for "C. P." put "C. P. Cooper."  
135. *Lord Mostyn v. Spencer* was affirmed by the Lord Chancellor in November 1844.  
156. note (a), add "page 590."  
239. the case of *Matthews v. Brise* has been heard on appeal by the Lord Chancellor, and now stands for judgment.  
In this case alter the 26th line in the marginal note thus, "them undistinguished."  
246. *Sandon v. Hooper* affirmed by the Lord Chancellor 21st of December 1844.  
281. marginal note, after line 10. add "on behalf of the Defendant."  
376. *Spalding v. Ruding* has been heard on appeal by the Lord Chancellor.  
433. *Millar v. Craig*. An appeal to the Lord Chancellor is pending in this case.

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NOTE. *Attorney-General v. Potter*, 5 Beavan, 164., was affirmed by the Lord Chancellor on the 19th of November 1844.  
The appeal in *Davies v. Fisher*, 5 Beavan, 215., note, has been compromised.  
*Sayer v. Wagstaff*, 5 Beavan, 415., was affirmed by the Lord Chancellor 4th of December 1844.  
*Byng v. Lord Strafford*, 5 Beavan, 558., has been affirmed by the House of Lords.





